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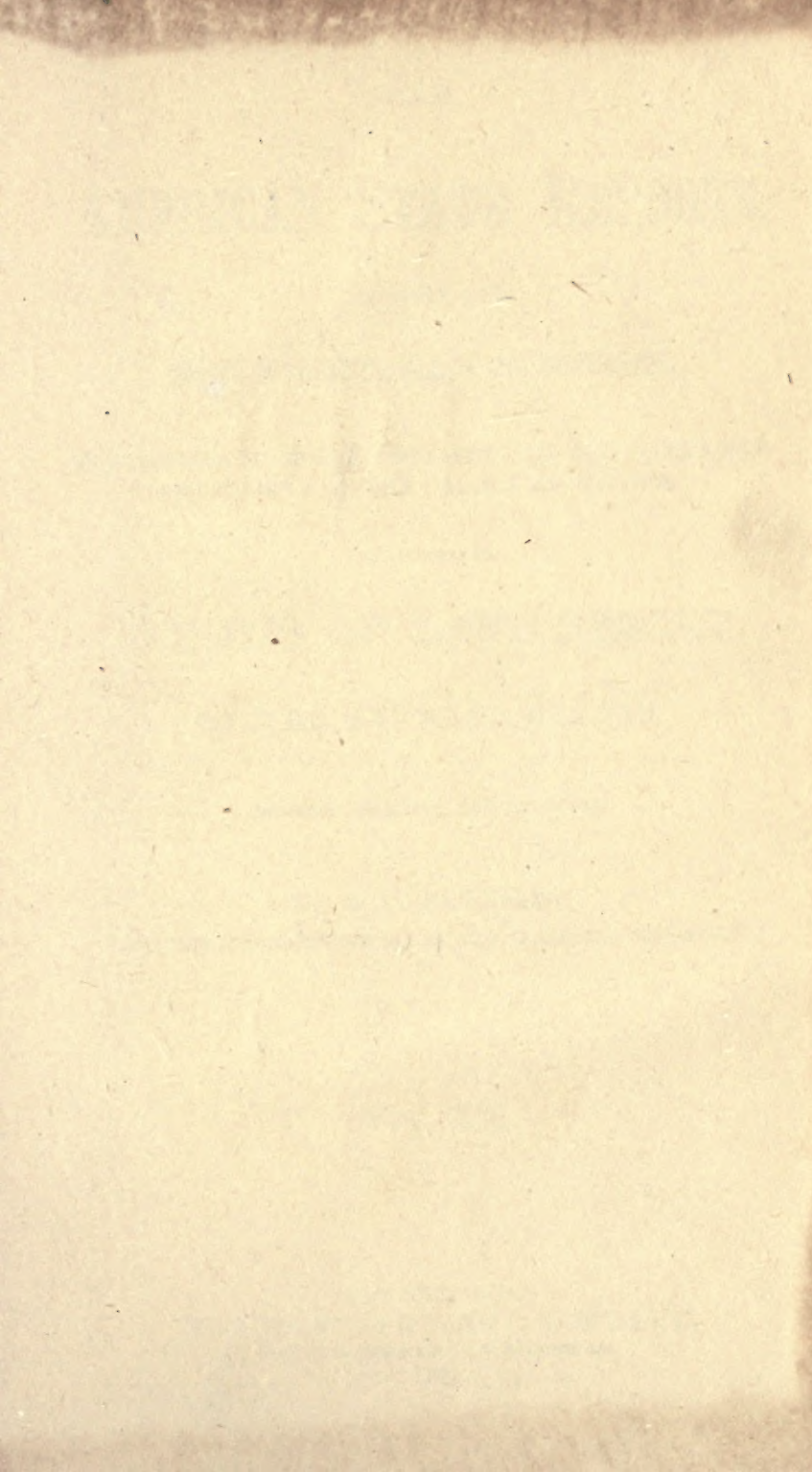
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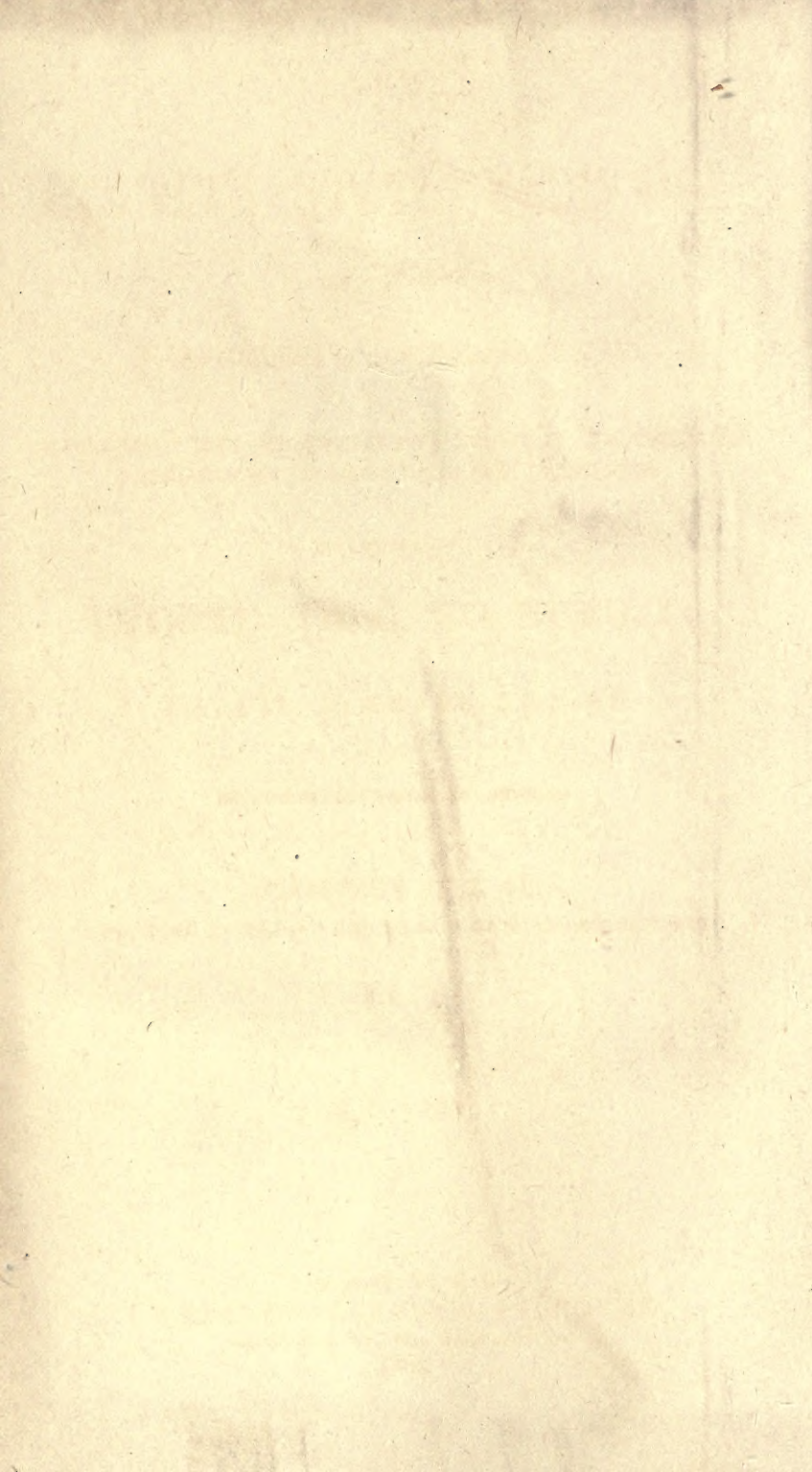


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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT
OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XX.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY.
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1891.

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CASES

IN THE

SUPREME COURT

OF

WISCONSIN.

STEWART v. EVERTS.

[76 WISCONSIN, 35.]

APPEAL—PRACTICE UPON REVERSAL OF JUDGMENT.—As a general rule, the appellate court, in an action at law, when the case is tried by a jury, upon issues of fact, can only remand the case for a new trial. It has no authority to direct the trial court to correct the error upon an issue of fact, and to enter judgment accordingly.

NEGLECT—EVIDENCE.—In an action by a passenger against a railroad company to recover for personal injuries caused by a broken rail, evidence of the defective condition of the track in places not in the vicinity of that accident, and so far distant therefrom that they could not by any possibility have in any way contributed to the accident which caused the injury sued for, is not admissible.

NEGLECT—EVIDENCE.—In an action by a passenger against a railroad company to recover for personal injuries caused by reason of a broken rail, plaintiff should not be permitted to exhibit to the jury pieces of a broken rail, claimed to have been picked up at the place of accident, six months thereafter, and after exposure for that length of time to the action of the elements; nor should his counsel be permitted to comment to the jury upon the character and condition of such pieces of rail, nor should the jury be allowed to draw a conclusion from an inspection of such pieces of rail, as to the soundness or unsoundness thereof.

EVIDENCE.—MEDICAL EXPERT CONSULTED AFTER THE commencement of the action, for the sole purpose of testifying on behalf of plaintiff, should not be permitted to testify to statements made by the latter as to his symptoms, pains, feelings, and condition, from the time of the injury to the time of consultation, especially when plaintiff is a competent witness, and has been sworn and examined in regard to the same matters.

NEGLECT—EVIDENCE.—In an action by a passenger against a railroad company to recover for personal injuries caused by reason of a broken rail, evidence as to the condition of the railroad ties at the place of the accident, as to their soundness and the condition of the road-bed there

at the time that the ties were removed and the road repaired, six months after the accident happened, is competent, as tending, to some extent, to show the condition at the time of the accident.

D. S. Wegg and Howard Morris, for the plaintiffs in error.

Cate, Jones, and Sanborn, and D. Lloyd Jones, for the defendant in error.

TAYLOR, J. The defendant in error brought an action in the circuit court to recover damages of the plaintiffs in error, as trustees in possession of and operating the Wisconsin Central railroad, in this state, for an alleged injury received by him while traveling as a passenger on a railroad train on said road. The injury occurred on a very cold morning in January, by the breaking of a rail, and throwing the cars from the track, and thereby injuring the plaintiff, who was at the time in the postal-car of said train. The claim of the plaintiff on the trial was, that the breaking of the rail was caused by the imperfect construction and maintenance of the road at the place of the accident. The plaintiffs in error contended that the accident was the result of the extreme cold at the time, being from thirty to forty degrees below zero, and not from any defect in the construction or maintenance of the track at the place of the accident. On the trial, the plaintiff in the court below recovered a verdict; and from the judgment entered upon such verdict the defendants bring a writ of error to this court, alleging several grounds of error.

On the hearing in this court, the learned counsel for the plaintiffs in error contend that, upon the whole evidence given on the trial, the learned circuit judge should have directed a verdict for the defendants, and asks this court to reverse the judgment of the circuit court, for error in that respect, and to remand the case, with directions to the circuit court to enter a verdict for the defendants. If we were of the opinion that the learned counsel were correct in their contention that the circuit court should, upon the whole evidence, have directed a verdict for the defendants, still we are of the opinion that this court, upon appeal, ought not to direct such disposition of the case on reversal of the judgment. As a general rule, this court can only reverse the judgment of the trial court in an action at law, when the case is tried by a jury upon issues of fact, and remand the case for a new trial. We have no authority to direct the trial court to correct the error upon an issue of fact, and enter judgment. We cannot say that the

party who failed in his proofs on the first trial may not sustain the issue upon a new trial. Upon an appeal or writ of error from a judgment at law, when the action is tried by a jury, this court does not retry the case, but simply corrects the errors, if any, which have occurred upon the trial in the court below, and it is only in exceptional cases that this court will direct a judgment to be entered in the action by the court below: *Pickett v. School Dist.*, 25 Wis. 551, 559; 3 Am. Rep. 103. In this case the trial court was directed to dismiss the complaint, because it was apparent that the plaintiff could not, upon any state of the proofs he might make upon a new trial, recover in the action.

The learned counsel for the plaintiffs in error allege as error that the court permitted, against their objections, evidence to be introduced on the part of the plaintiff showing or tending to show that the track of their railroad was out of repair at points distant from the place of the accident. We think the court extended the rule too far in allowing the plaintiff to show the condition of the track at places not in the vicinity of the place where the accident occurred, and which defects in the road could not, by any possibility, have in any way contributed to the accident which occurred at the time of the plaintiff's injury.

The plaintiff was permitted to bring into court, and exhibit to the jury, pieces of a broken rail which the plaintiff claimed to have picked up at the place of the accident, about six months after the accident occurred. He was also allowed to comment to the jury upon the character and condition of these pieces of rail, in his opening argument. To the introduction of these pieces of rail in evidence, and to the comments of the counsel to the jury, upon their character and condition, the defendants duly excepted. We think it was error to permit the plaintiff to exhibit these pieces of rail to the jury, and comment on them in his argument to the jury. One claim of the plaintiff was, that the rail was an imperfect one, and the jury found that it "was not a good, sound rail." After careful review of the evidence upon this question, it appears to me that there is no evidence tending to show the rail was not a good, sound rail, unless it can be inferred that it was not because it was broken by the passage of the train, or from the pieces of rail produced and exhibited by the plaintiff to the jury.

Admitting that the pieces of rail produced in court were sufficiently identified as pieces of the broken rail (which is,

certainly, not clearly established), it seems to us that it was error to permit the jury to draw a conclusion as to the soundness or unsoundness of an iron rail by an inspection of pieces of it more than six months after the accident, and after the pieces exhibited had been exposed to the action of the weather from January until June. It is evident that after such exposure no inexperienced man could tell whether there were any flaws in the iron at the places where it was broken; and it is equally clear that the inexperienced jurors would not be competent, from mere inspection, to determine the quality of the iron at the time of the breakage. The only object of the introduction of this evidence to the jury must have been to allow them to judge, from the present appearance of the pieces of iron exhibited, whether, at the time they were broken from the rail, such rail was a good and sound rail; and for that purpose we think it was clearly incompetent. It would certainly require more than ordinary skill and knowledge in any person to draw any correct inference from such examination of the broken rail. There is no presumption nor proof that the jurors were persons of knowledge or skill in regard to these matters. I do not suppose the learned counsel for the plaintiff would contend that it would have been competent on his part to have called as a witness a man of ordinary intelligence, and without showing him to have had any experience or scientific knowledge upon the subject, and asked him whether, from an examination of the pieces of the rail then in court, the rail from which they were broken was at the time a sound rail. Yet that is the very question he propounds to each of the jurors by the exhibition of these pieces to them, and by his comments upon them in his argument. The question of the decay and rottenness of iron is not a question of common knowledge, which is supposed to be known by all men of ordinary intelligence. It is not like the decay and rottenness of wood, the evidences of which are so clear and manifest that any person of ordinary intelligence can understand them.

The counsel for the plaintiffs in error took exception to the statements made by the expert witness, Dr. Clevenger. The doctor was consulted by the plaintiff after this action was commenced, for the purpose of being a witness on the trial of this action on the part of the plaintiff, and not for the purpose of medical advice or treatment. Against the objection of the defendants, this witness was permitted to detail all the statements made to him by the plaintiff, of his symptoms, pains,

feelings, and his condition, from time to time, from the date of his injury down to the time of his consulting with him. From an examination of the plaintiff's testimony given upon the trial, as to his symptoms, pains, feelings, and the condition of his health, since the accident, and the testimony of Dr. Clevenger as to his statements to him upon the subject, it will be seen that what the doctor testifies to, as to the statements made to him, corresponds almost literally with those made by the plaintiff on the trial. There was therefore no necessity that the statements made by the plaintiff to Dr. Clevenger should be detailed by him on the trial, in order that he might form a correct opinion whether the troubles of the plaintiff were properly attributable to his injuries received at the time of the accident.

It will hardly be contended that the plaintiff could have introduced these statements, made by himself long after the action was commenced, as evidence on his part to prove the effect which the accident had upon his health, or to corroborate his statements made under oath as a witness on the trial of the action; and if they were not admissible for these purposes, we fail to see how they are admissible at all, unless they were admissible in order to enable the expert witness to determine as to what was the real nature of his troubles at the time he was examined by him. It is clear that they were not admissible for the purpose of determining whether such present condition of the plaintiff was attributable to the accident, and it was mainly for that purpose that such statements were admitted. The statements of a party, made in his own favor, are seldom, if ever, received as evidence in his own behalf, except when they are made at such times and under such circumstances as to be a part of the *res gestæ*. It may be urged that this evidence could not have prejudiced the defendant, because the plaintiff made the same statements to the jury as a witness on the trial. This fact has never been held a sufficient reason for holding that the statements of the party, made out of court, and not under oath, may be received in evidence on the trial. It is a method of bolstering up or sustaining the evidence of a party which has never received the sanction of the courts, and is clearly not admissible. That this evidence was improperly received is clearly shown by the following authorities: *Illinois Central R. R. Co. v. Sutton*, 42 Ill. 441; 92 Am. Dec. 81; *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Grand Rapids etc. R. R. Co. v. Huntley*, 38 Mich. 543; 31

Am. Rep. 321; *Heald v. Thing*, 45 Me. 392; *Quaife v. Chicago etc. R'y Co.*, 48 Wis. 513, 526; 33 Am. Rep. 821; *Kreuziger v. Chicago etc. R'y Co.*, 73 Wis. 158, 164. Whatever may be the rule as to the admissibility of the statements made by a party when consulting a physician or surgeon for the purpose of obtaining advice or treatment for his disease or injury, we are clear that, when such statements are made by the party after action commenced, to an expert, for the sole purpose of calling such expert as a witness for himself on the trial of the action, to give an opinion as to the nature of his complaint or injury, and its connection with certain alleged causes, such statements are inadmissible in his own behalf. To allow such statements to be given in evidence would be to allow the party to give in evidence his declarations made not under oath, to bolster up and confirm his statements made on the trial, under oath, which all courts hold to be incompetent, and not permissible. This rule of exclusion is especially applicable to the case where the person whose state of health, or whose injuries are the subject of controversy, is himself a competent witness in the case, and is sworn and examined in regard to his health or injuries.

It was also objected by the counsel for the plaintiffs in error that it was error to permit the plaintiff to show what the condition of the ties was at the place of the accident the next summer, when the road was repaired at the point where the accident happened. We think the evidence as to the condition of the ties at that place, as to their soundness, and the condition of the road-bed there at the time the ties were removed, in the summer, after the accident happened, competent evidence, as tending, to some extent, to show the condition at the time of the accident. The mere fact that the road was repaired at that place six months after the accident would not in itself be competent evidence tending to show that it was out of repair when the accident happened; but if, in making such repairs, it was found that the ties were in such a state of decay as to fairly lead to the conclusion that they were in a decayed state when the accident happened, or that the condition of the road-bed was such as would fairly tend to prove that it was not in a safe condition when the accident happened, such evidence would be clearly admissible. Its weight would be a question for the jury.

For the errors in admitting evidence above mentioned, the judgment of the circuit court must be reversed.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

RAILROADS — DEFECTIVE TRACKS. — The question of the liability of a railroad company for damages for injuries occasioned by the defective condition of its track must be confined to the condition of the track at the time and place of the accident, and evidence of the state of the track elsewhere, or of previous accidents, is inadmissible: *Missouri P. R'y Co. v. Mitchell*, 75 Tex. 78; but see *Tetherow v. St. Joseph etc. R. R. Co.*, 98 Mo. 74; 14 Am. St. Rep. 617; *Clapp v. Minneapolis etc. R'y Co.*, 36 Minn. 6; 1 Am. St. Rep. 629; *Little Rock etc. R'y Co. v. Eubanks*, 48 Ark. 460; 3 Am. St. Rep. 245. In *Worden v. Humeston etc. R'y Co.*, 76 Iowa, 311, an action for damages for the death of an engineer, caused by a defective track, the court decided that a witness might testify about a defect in the track, which he located about the place of the accident, although he was not able to locate it at that spot exactly.

GILBERT v. STOCKMAN.

[76 WISCONSIN, 62.]

VENDOR AND VENDEE — PAROL EVIDENCE TO VARY CONTRACT OF SALE —

When a contract for the sale of land calls for a quitclaim deed, and provides that the vendee shall pay all taxes assessed on the land after a certain date, parol evidence is inadmissible to show a contemporaneous oral agreement that the vendor contracted to pay all taxes on the land assessed prior to such date, in the absence of claim or proof of any mistake or fraud in draughting the contract, or that it does not contain all that the parties intended should be inserted therein.

VENDOR AND VENDEE — PAROL EVIDENCE TO VARY CONTRACT OF SALE. —

Parol evidence cannot be admitted to vary or contradict the terms of a written contract for the sale of land complete in itself, nor to add a material condition to the contract as written.

VENDOR AND VENDEE. — WHERE WRITTEN PORTION OF CONTRACT FOR SALE OF LAND is inconsistent with the printed form upon which the contract is drawn, as to the character of deed to be executed, the written portion must control.

ACTION to recover \$50 alleged by plaintiff to be due him from defendant, who admitted the indebtedness, but set up a counterclaim for \$56.42 paid by him for taxes upon a tract of land purchased by him from plaintiff. Judgment for defendant, and plaintiff appealed.

Armstrong Taylor, for the appellant.

R. H. Start, for the respondent.

COLE, C. J. The controversy in this case arises upon the defense or counterclaim set up in the answer. It appears that the defendant, in January, 1881, purchased of the plaintiff a certain tract of land for an agreed price. The contract

was a printed blank, filled up, and was in the ordinary form of a land contract, except where the form provided for the giving of a warranty deed on payment of the consideration money, the word "warranty" was erased, and the word "quit-claim" inserted. There was a clause in the contract, by which the defendant agreed to pay all taxes, special or general, which had been assessed against the land since the first day of July, 1880, and also such as might be thereafter assessed thereon, until the purchase-money was fully paid. The defendant claimed that at the time the sale was made and the contract entered into the plaintiff informed him that there were some back taxes assessed upon the land prior to July, 1880, and that the plaintiff agreed, if the defendant would purchase the land for the sum of \$225, that he would pay these back taxes; and it is also alleged in the answer, that the defendant, relying upon this promise, and in consideration thereof, did purchase the land and execute the contract. It appears that a tax deed was issued for the delinquent taxes, and the defendant had to pay \$56.42 to buy in this tax title. He therefore seeks to recover this amount, as against the plaintiff's claim, by virtue of the parol agreement that the latter would pay the back taxes.

It is not claimed that there was any mistake or fraud in draughting the written contract, or that it does not contain all that the parties intended should be inserted therein. The defendant did not seek to have the contract reformed so as to incorporate therein the alleged verbal agreement that the plaintiff would pay all back taxes assessed upon the land prior to July, 1880, but he sought to show, and was allowed to prove, the parol agreement, against the objection of the plaintiff, taken in various ways upon the record. And the real question in the case is, Was it competent to make this proof, under the circumstances? It seems to us this question must be answered in the negative. The effect of the parol evidence was to add a material and important stipulation to the written contract, and was therefore inadmissible, upon well-settled rules of law. Where it appears that the whole agreement has been reduced to writing, proof of contemporaneous verbal agreements cannot be received to alter or change the written agreement. This rule has been often laid down by this court. The plaintiff's counsel has cited several of these decisions, and they are familiar to the profession. The rule is not applicable where the writing does not attempt to

state the entire agreement in respect to the subject-matter, nor where the parol agreement relates to some collateral matter, nor where there is a total or partial failure of consideration. The distinction is clearly pointed out in *Frey v. Vanderhoof*, 15 Wis. 397; *Hahn v. Doolittle*, 18 Wis. 196; 86 Am. Dec. 757; *Hubbard v. Marshall*, 50 Wis. 322. The contract in this case has a stipulation in regard to taxes, and the presumption is, that it contains all that the parties had agreed upon on that subject. So the direct effect of a parol agreement about paying the back taxes was to add a material condition to the contract as written. Now, while it is well settled that parol evidence cannot be admitted to contradict or vary the terms of a written instrument, yet it may be admitted to prove a collateral agreement connected with the stipulations in a deed, and in no respect repugnant to it. "Conveyances are frequently made in execution of agreements which the conveyances themselves do not show or attempt to show; and although no parol evidence would be admissible to change the legal effect of the conveyances themselves, yet it may be admitted to show upon what consideration they were made, and to show the whole transaction, where the conveyances constitute only a part": *Frey v. Vanderhoof*, 15 Wis. 397. The learned counsel for the defendant has cited a large number of cases where that rule has been acted upon: *Batterman v. Pierce*, 3 Hill, 171; *Remington v. Palmer*, 62 N. Y. 31; *Chapin v. Dobson*, 78 N. Y. 74; 34 Am. Rep. 512; *Taintor v. Hemmingway*, 18 Hun, 458; *Peet v. Kent*, 5 N. Y. St. Rep. 134; *Adams v. Van Brunt*, 11 N. Y. St. Rep. 659; *Carr v. Dooley*, 119 Mass. 294; *McCormick v. Cheevers*, 124 Mass. 262; *Powelton Coal Co. v. McShain*, 75 Pa. St. 238; and other cases where evidence was admitted to prove some independent or collateral agreement founded upon the consideration in the deed, or where the writing did not contain the entire contract made by the parties.

But it is obvious that the principle of these decisions does not apply here, because the written contract bears no indication that anything was omitted therefrom, and is full and complete in and of itself. As we have said, the necessary effect of the proof of a parol agreement was to change the terms of the written instrument, which is complete and contains the stipulations of the parties; and when the parties stipulated as to the payment of certain back taxes, it is inconceivable that they should have failed to include the alleged

agreement of the plaintiff in regard to them, if he had undertaken to pay any of them. The parties evidently had in mind the extent of their mutual engagements, for provision was made for giving a quitclaim deed instead of a warranty deed; and there can be no doubt that the plaintiff would have kept his engagement by executing the usual quitclaim deed, notwithstanding the printed portion of the contract provided that the deed given should contain the usual covenants of title. The written portion of the contract is inconsistent with the printed form, and should control as to the character of the deed. We have examined the cases cited by defendant's counsel, but do not think they sustain his contention that parol evidence was admissible to prove that the plaintiff agreed to pay the back taxes, which evidence clearly adds an important stipulation to the terms of the written agreement.

It follows from these views that the judgment of the circuit court must be reversed, and the case be remanded for a new trial.

CONTRACTS — PAROL EVIDENCE. — In the absence of fraud or mistake, where a contract in writing contains all the essential elements of a valid contract, no parol testimony can be admitted to vary, extend, or contradict it: *Note to Appeal of Cornwall etc. R. R. Co.*, 11 Am. St. Rep. 893, 894. Antecedent and contemporaneous agreements are considered to have been merged into the written contract: *Note to Sullivan v. Lear*, 11 Am. St. Rep. 394; *Downie v. White*, 12 Wis. 176; 78 Am. Dec. 731. But parol evidence is admissible to show the real consideration of a contract: *First National Bank v. Snyder*, 79 Iowa, 192; or to show the situation and knowledge of the parties at the time of entering into a contract in writing: *McDonald v. Unaka Timber Co.*, 88 Tenn. 38; or to prove a contemporaneous agreement between the parties, between whom the relation of debtor and creditor exists, showing that a deed absolute upon its face was intended to be merely a mortgage: *Scarborough v. Alcorn*, 74 Tex. 359.

SMITH v. NIPPERT.

[76 WISCONSIN, 86.]

CONSPIRACY — INQUISITION OF LUNACY. — A complaint claiming damages, and alleging that defendants maliciously conspired together and willfully, maliciously, and falsely sued out an inquisition of lunacy against plaintiff, with intent to destroy her character, deprive her of her means of support, and force her to leave the community, and also to destroy her testimony in a criminal prosecution against one of the defendants, whereby plaintiff has been brought into public scandal and disgrace, and greatly injured in her reputation and business as a dressmaker, states a good cause of action.

Grtphorst, Remington, and Buckley, for the appellants.

R. D. Evans and T. J. Brooks, for the respondent.

COLE, C. J. We think the complaint in this case states a cause of action. It is alleged, in substance, that the defendants, maliciously conspiring together with intent to injure, defame, and destroy the character of the plaintiff, and to deprive her of her means of support, and to force her to leave the community where she lived, willfully, maliciously, and falsely sued out an inquisition of lunacy against her, for the purpose of driving her from where she dwelt; and by maliciously causing it to be believed that she was insane, and not a proper person to be employed or introduced in the households where she had theretofore found employment, they did the wrongful acts complained of. These acts were naturally calculated to injure her in her business or occupation, which was that of a dressmaker or seamstress, and it is stated that they did injure her to the amount of two thousand dollars. The complaint clearly alleges an illegal conspiracy, and an attempt to pervert the inquisition of lunacy to a most unlawful purpose to the actual damage of plaintiff. But damage sustained is the *gravamen* of the complaint. Now, the question is, Does not such an agreement between the defendants to wrongfully injure or prejudice the plaintiff in the community where she obtained employment, by causing it to be believed that she was insane, whether they acted from malicious or vindictive feeling towards her, or maliciously intended to accomplish unlawful purposes by improper means, where damage results, constitute an actionable wrong?

It would seem to be a reproach upon the law, if the agreement to do these things, and the actual doing of them, could not be redressed at the suit of the aggrieved party. This is not an action for a mere conspiracy where nothing has been done to accomplish the unlawful purpose; but the facts show that the defendants have proceeded to acts which, it is alleged, greatly injured the plaintiff in her reputation and business, and brought her into public disgrace. Damage to the plaintiff, for the wrong, is the ground of the action. Under the former practice, a plaintiff could maintain a special action on the case against several for conspiring to do, and actually doing, such unlawful acts, to his damage: *Hutchins v. Hutchins*, 7 Hill, 107; *Kimball v. Harman*, 34 Md. 408; 6 Am. Rep. 340; *Griffith v. Ogle*, 1 Binn. 172; *Haldeman v. Martin*, 10 Pa. St.

370; and the authorities cited in the opinions. In the last case, Gibson, C. J., says: "Conspiracy to do an illegal thing is actionable if injury proceed from it; and where the illegal purpose has been executed, it is false and malicious, wherever the motive for the conspiracy to execute it was false and malicious."

One object of a conspiracy in this case is alleged to be to destroy the plaintiff's testimony in a criminal prosecution against one of the defendants, by instituting the inquisition of lunacy. The means employed to accomplish the object were most reprehensible, but this is not the sole ground of the complaint. Other acts are stated, from which damage was sustained as the direct consequence of such wrongful acts, for which the plaintiff seeks redress. It is obvious that such damage, in the sense of the law, may arise out of the injuries to the character, business, and reputation of the plaintiff, for which she has a remedy. Indeed, injuries to the plaintiff's reputation and rights would seem to be the immediate and direct consequence of the acts complained of, and the allegation is positive that by reasons of the facts stated she "has been greatly injured in her profession and business, and brought into public scandal and disgrace," to her damage two thousand dollars.

In view of these facts, we hold that the complaint states a good cause of action. It shows that the defendants entered into a conspiracy to do an illegal thing, and that injury resulted from its execution, and that the motive was false and malicious. The means employed were most dishonorable, viz., the institution of the inquisition of lunacy for private ends, and to destroy testimony of a witness of a high crime.

We therefore think the order of the circuit court overruling the demurrer to the complaint was correct, and must be affirmed.

CONSPIRACY. — A conspiracy to vex and humiliate one by subjecting him to an inquisition of lunacy without probable cause is actionable: *Davenport v. Lynch*, 6 Jones (N. C.) 545.

NADAU v. WHITE RIVER LUMBER COMPANY.

[76 WISCONSIN, 120.]

MASTER AND SERVANT—DANGEROUS PLACE FOR WORK.—A master who fails to furnish a reasonably safe place in which the employee is to do his work is guilty of negligence, and if an injury occurs to the employee by reason of such negligence, without contributory negligence on his part, the master is responsible for damages sustained therefrom.

MASTER AND SERVANT—DANGEROUS PLACE FOR WORK.—A master is guilty of negligence in not furnishing a reasonably safe place for his employee to do his work, when the latter is unacquainted with the working of the master's mill, and of machinery in general, and is put to work, without being cautioned of danger, in a very narrow alley, on the side of which, and behind him, where he is doing his work, and at a point where it is necessary for him to pass, is a set of heavy cog-wheels, revolving inward, about eighteen inches above the floor, wholly uncovered on the side next the alley, and covered on top and thus partly obscured from the sight of the employee, and yet revolving so near the alley that his clothes, when he is passing by the cogs, can be readily seized by the revolving wheels, and his limbs drawn into and crushed by them.

MASTER AND SERVANT—NEGLIGENCE OF FOREMAN IS NEGLIGENCE OF MASTER.—The foreman of the master is guilty of negligence, when he has knowledge of the inexperience of the employee, and fails to point out to him the dangers of his employment when he employs him, and the negligence of the foreman in this respect is the negligence of the master.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE, WHEN QUESTION OF FACT.—When an inexperienced employee is put to work in a dangerous place, which is pointed out to him by the master from a place where the danger cannot be seen, and after working five days receives an injury, but testifies that he did not know of the danger until the time of the accident, the question of his contributory negligence is for the jury to determine.

MASTER AND SERVANT.—RISKS ASSUMED BY EMPLOYEE are those reasonably incident to his employment, and no others, unless unusual and unreasonable risks are open and visible, and known to and comprehended by the employee. He then assumes all risks so known to him, whatever they may be.

MASTER AND SERVANT—ASSUMPTION OF RISK.—BURDEN OF PROOF that an employee assumed an unusual risk attendant upon his employment is upon the employer, for the reason that the assumption of such risk is in the nature of contributory negligence on the part of the employee, which prevents his recovery.

MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.—In an action by an employee to recover damages for injuries received in a saw-mill, evidence, other than expert, is admissible to show that it is customary in other mills to cover dangerous machinery, as tending to show that defendant was negligent in not covering such machinery in his mill.

MASTER AND SERVANT—EVIDENCE OF STATEMENTS MADE BY INTERPRETER TO EMPLOYEE.—In an action by an employee to recover for injury sustained by coming in contact with dangerous machinery, after being employed by the master's foreman through an interpreter, evidence as to what the interpreter at that time told the employee, as to what the foreman then said about giving the employee a safe place, or that there was no danger, is admissible.

ACTION by an inexperienced employee, nineteen years of age, to recover for injuries received from dangerous machinery in a saw-mill. Judgment for plaintiff, and defendant appealed.

Miles and Shea, and Pinney and Sanborn, for the appellant.

Rusk and Boland, for the respondent.

TAYLOR, J. The respondent brought this action to recover damages for an injury which he received while working for the appellant in its saw-mill. The injury was received by having his leg caught in a cog-wheel gearing, which was in the vicinity of the place where the plaintiff was at work, and crushed so that it became necessary to amputate the leg above the knee. On the trial the plaintiff recovered a verdict, and from the judgment entered on the verdict the defendant appeals to this court.

There are certain facts in the case about which there is no dispute. It is undisputed that the plaintiff, at the time of the injury, was about nineteen years old; that until he commenced work for the defendant he was wholly unaccustomed to working in a saw-mill, or working in or about machinery. His principal business had been working in the woods, getting out logs, and on drives on the rivers; that at the time he sought for employment from the defendant he desired to get employment on a drive, and not in the mill; and that the foreman of the defendant, who employed him, was told that he had no experience in working in a mill, and would prefer some other employment. The evidence of the plaintiff tends to prove that when the plaintiff stated that he did not want to work in the mill, and preferred other work, the foreman of the defendant told him he would give him an easy place, and one not dangerous, and showed him the place where he was to work. The plaintiff was employed and set at work to pick up the edgings which came down with the boards from the edger, and throw them upon what was called a "slasher."

The mill in which he was set at work is a large double mill. The main saws were at the north end of the mill. The plaintiff was set at work on the west side of the mill, and alongside of a set of rollers which carried the lumber and edgings from the edger north of him, and by where he was placed; and it was his duty to pick up from the rollers the edgings, and throw them east, across the rollers, and onto the slasher. Immediately behind where the plaintiff was at work was a large

set of rollers, which carried the timber and slabs which came from the rotary saw south to the south part of the mill, and past the place where plaintiff was at work. This large set of rollers was driven by a long shaft, which was about twenty inches above the level of the floors where the plaintiff was at work, and extended considerably farther south than it was necessary for the plaintiff to move in doing his work. This long shaft was covered on the top by a plank about a foot wide, its whole length. Between this covered shaft and the set of rollers which carried the edgings there was an alley about eighteen or nineteen inches wide, and it was in this alley the plaintiff was to do his work. In doing his work, his back would be towards this long shaft. This long shaft was driven by another vertical shaft, which came up from below, through the floor, under the plank which covered the long shaft. The vertical shaft carried on its top a beveled horizontal cog-wheel, which matched in a beveled vertical cog-wheel, of about the same size, attached to the long covered shaft. These wheels turned inwards from the alley in which the plaintiff was at work, and they were under the plank which covered the long shaft. The point of contact of the beveled cog-wheels was about eighteen inches above the floor, where the plaintiff was at work, and eight or ten inches below the plank that covered the long shaft. On the side where the plaintiff was at work there was no covering, either of the long shaft or the upright shaft, and the horizontal cog-wheel on the top of the vertical shaft came nearly or quite as far towards the alley where plaintiff was at work as the plank covering over the long shaft, so that the clothing of a person passing along this alley, close to the covering, might be caught by these cog-wheels, and drawn into them.

The plaintiff had worked in this alley five days before the accident occurred; and he claims, and the evidence tends to show, that at the time of the accident he was at work near this upright shaft, and as he stooped down to pick up the edgings from the rollers in front of him, with his back towards the shaft, the cog-wheels caught his pants, and drew his leg into the wheels, and crushed it. The evidence also tends to show that in doing his work in the alley it was only occasionally that it would be necessary for the plaintiff to go as far south as to pass by the upright shaft and cog-wheels. As a general rule, he would do his work at a point considerably nearer to the edger than where the cog-wheels were placed.

The evidence also shows that when the foreman employed the plaintiff, and ordered him to work at the place mentioned, he did not, in any way, point out to him the location of this set of cog-wheels, or warn him as to the dangerous character of the wheels, or in fact give him any instructions or warning. The plaintiff testified on the trial that he had not noticed these wheels until he was caught by them and injured; that up to that time he had not looked for them, and did not know they were there. They were uncovered on the side next to him, and he could have readily seen them had he looked in the direction of them. The plaintiff gave evidence tending to show that these wheels, in the situation they were in, were dangerous to persons whose duty it was to work in the narrow alley opposite to them, and also evidence tending strongly to show that, ordinarily, wheels situate as these were were covered, not only on the top, but on the side; that they could be so covered without any injury to their efficiency, and at a very trifling expense.

The jury found a general verdict in favor of the plaintiff, and assessed his damages at the sum of \$9,650. The jury also answered the following interrogatories:—

“1. Did the defendant exercise ordinary care in placing in its mill the machinery by which the plaintiff was injured? We answer, ‘No.’

“2. Did the defendant exercise ordinary care in running its mill with the machinery in the condition in which it was at the time the plaintiff was injured? We answer, ‘No.’

“3. Was the machinery, in the condition in which it was at the time of the injury, dangerous? We answer, ‘Yes.’

“4. Did the defendant know that said machinery was dangerous? We answer, ‘Yes.’

“5. Did the defendant have reasonable cause to believe that said machinery was dangerous? We answer, ‘Yes.’

“6. Ought the defendant to have known, by reasonable care and diligence, that said machinery was dangerous? We answer, ‘Yes.’

“7. If you answer that said machinery was dangerous, was its dangerous character apparent and obvious to the senses? We answer, ‘It was not, to an inexperienced person.’

“8. Did the plaintiff know, while in the employ of the defendant, and prior to said injury, that said machinery was dangerous? We answer, ‘No.’

“9. Could the plaintiff have known that said machinery

was dangerous, by the exercise of reasonable care and diligence? We answer, 'Yes, if he was informed of the danger; but he was not informed.'

"10. Did the plaintiff's carelessness contribute to said injury? We answer, 'No.'

"11. Did the plaintiff, prior to the injury, have sufficient knowledge to comprehend the dangers incident to his employment? We answer, 'No.'

"12. Could the plaintiff, by the exercise of ordinary care, have avoided said injury? We answer, 'No.'

"13. If you answer the eleventh interrogatory, 'No,' did the defendant know, or have reasonable cause to know, of the plaintiff's said ignorance and inexperience? We answer, 'Yes.'

"14. Was the usual and customary means adopted in the mill in question to guard against accident by the cog-wheels and gear where the accident occurred? We answer, 'No.'"

The learned counsel for the appellant claims that the trial court erred in not nonsuiting the plaintiff upon its motion on the trial, upon two grounds: 1. They claim that the evidence fails to show any negligence on the part of the defendant in constructing the machinery in the mill, or in neglecting to cover the cog-wheels in the vicinity of the place where the plaintiff was placed to do his work, or in failing to instruct the plaintiff as to the nature of his work when it employed him, or in failing to point out to him the dangerous position of the cog-wheels in the immediate vicinity of the place he was at work; and 2. On the ground that plaintiff was guilty of contributory negligence; that under the evidence it must be conclusively held that the plaintiff was aware of the situation of the cog-wheels before the accident happened, and that he had sufficient knowledge to know and fully comprehend the dangerous character of said wheels; and consequently he assumed the danger incident to his work at the time and place of the accident.

After a full consideration of all the evidence in the case, we have no hesitancy in saying that there was an abundance of evidence given on the part of the plaintiff tending to show that the place where the plaintiff was set to perform his work was not a reasonably safe place, on account of the immediate vicinity of the uncovered cog-wheels. This court has frequently decided that the law demands of a master or employer that he shall furnish a reasonably safe place in which the

employee is to do his work. If the master fails in this respect, he is guilty of negligence; and if an injury occurs to the employee by reason of the dangerous nature of the place where the employee is at work, without any negligence on the part of the employee which contributed to the injury, the employer is responsible to the employee for the damages sustained by him. This rule has been frequently affirmed by this court, and there is no necessity of calling attention to the uniform decisions of other courts sustaining the rulings of this court on this question. Upon this question, see *Dorsey v. Phillips & C. Const. Co.*, 42 Wis. 583; *Bessex v. Chicago & N. W. R'y Co.*, 45 Wis. 477; *Hulehan v. Green Bay W. & St. P. R'y Co.*, 58 Wis. 319; *Heine v. Chicago & N. W. R'y Co.*, 58 Wis. 525, 531; *Hulehan v. Green Bay W. & St. P. R'y Co.*, 68 Wis. 520, 526

The question in this case was clearly a question for the jury. Was it a reasonably safe place for the plaintiff to do his work? What are the facts? The plaintiff was to work in a very narrow alley, not to exceed nineteen inches in width. On the side of this alley, and behind him, where he was doing his work, and at a point where it was necessary for him to pass at times in doing such work, was a set of heavy cog-wheels, revolving inward, about eighteen inches above the floor, wholly uncovered on the side next the alley, and covered on the top, so as to be to some extent obscured from the sight of the person working in the alley, and yet revolving so near the alley that the clothes of the employee passing along by them could be readily seized by the revolving wheels, and the limbs of the employee drawn into and crushed by them. We are clearly of the opinion that the jury were justified in finding that the defendant was guilty of negligence in not furnishing a reasonably safe place for the plaintiff to do his work. No intelligent man could well be mistaken as to the dangerous character of this place, especially to a workman unaccustomed to working in a mill and wholly unacquainted with the working of machinery in general.

There was also sufficient evidence tending to show that, generally, mills constructed as this was had this gearing covered on the sides as well as on the top. There being no reason why it could not as well be covered as to run uncovered, and the trifling expense of covering the same, fully justified the jury in answering the first and second questions submitted to them in the negative, and the third, fourth, and sixth in the

affirmative. The danger of accidents resulting from the use of such uncovered cog-wheel gearings had become so manifest, especially where run in the immediate vicinity where men are necessarily at work, that the legislature of this state, in 1887, made the neglect to cover such gearings an offense. The language of the statute is as follows: "All belting, shafting, gearing, hoists, fly-wheels, elevators, and drums of manufacturing establishments, so located as to be dangerous to employees when engaged in their ordinary duties, shall be securely guarded or fenced, so as to be safe to persons employed in any such place of employment": Laws of 1887, c. 549, sec. 2. That this set of cog-wheels was dangerous, even to the most experienced workman, can hardly admit of a doubt. A slight forgetfulness on the part of the workman while attending to his work might bring him in contact with it. An accidental slip while at work might bring his clothing and limbs in contact with it; and we have no hesitancy in holding that when the employer places such a dangerous piece of machinery, into which his employee, by the least forgetfulness or unavoidable accident, may be thrown and seriously injured, in the immediate vicinity of a place where his employee must do his work, he fails to furnish him a reasonably safe place for doing his work, and is guilty of gross negligence, especially when the usefulness of the machine is not enhanced by reason of its being uncovered, and when the expense of covering would be a mere trifling sum. The case of the plaintiff was fully sustained by the evidence on this point.

We are equally well satisfied that the foreman of the defendant was also negligent in not pointing out to this inexperienced youth the dangers which were incident to his employment when he employed him. The foreman was warned at the time that the plaintiff was wholly without experience in doing work in a mill or in the vicinity of any machinery; that although he was of such an age as to comprehend that there were dangers in being employed in a mill which were not attendant upon other employments, yet as to the particular nature of such attendant dangers he was wholly ignorant. Under such circumstances, all courts hold that it is the duty of the employer to instruct the employee as to such attendant dangers, and put him on his guard against them: See *Strahlendorf v. Rosenthal*, 30 Wis. 674, 678; *Jones v. Florence Mining Co.*, 66 Wis. 268, 277; 57 Am. Rep. 269; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 3

Am. Rep. 506; and other cases cited in the opinion in *Jones v. Florence Mining Co.*, 66 Wis. 268, 277; 57 Am. Rep. 269.

There was evidence which clearly sustains the finding of the jury "that, prior to the injury, the plaintiff did not have sufficient knowledge to comprehend the dangers incident to his employment," as well as the finding that the defendant knew, or had reasonable cause to know, that the plaintiff was ignorant and inexperienced. It is hardly necessary to cite authorities to show that the defendant in this case is bound by the acts of its foreman in employing and setting the plaintiff at work in the manner he did.

The learned counsel insist that if it be admitted that there is evidence sufficient to show that the defendant was guilty of negligence which contributed to the accident, still the plaintiff cannot recover, because he was guilty of contributory negligence in commencing to work in the place pointed out to him by the foreman, and continuing to work there five days and more. It is urged that, upon all the evidence in the case, it is conclusively established that the plaintiff must have known of the existence of the uncovered gearing, and have fully comprehended the dangers incident to its condition in his immediate vicinity; and therefore, under the general rule, he assumed the dangers incident to his employment, and so cannot recover. Whether the plaintiff knew what is claimed by the learned counsel for the defendant, was not a question of law, upon all the evidence, but a question of fact, and was therefore properly submitted to the jury, and they have found against the contention of the learned counsel for the defendant; and that finding is sustained by sufficient evidence. The learned counsel contend that the foreman pointed out the place where the plaintiff was to work before he was employed. It is true the evidence shows that he was taken into the mill, and the place pointed out; but it does not show that he was taken into the narrow alley in which he was to work, and where he might, if his attention had been called to the machinery, have seen this dangerous gearing. The evidence tends to show that the place was pointed out from a point in the mill where this gearing could not be seen. The employee, when accepting an employment, assumes all the risks that are reasonably incident to such employment, and no other, unless the unusual and unreasonable risks of such employment are open and visible, and known to and comprehended by the employee; and in such case he

assumes all the risks so known to him, whatever they may be. This I have sometimes thought to be a harsh rule for the workman, and in many cases shields the employer from the results of carelessness and negligence on his part which border upon criminality; yet the rule seems to have received the sanction of the highest courts, and is sustained by the highest authority.

The learned counsel for the defendant also contend that the presumption is, that the plaintiff assumed all the dangers incident to his employment, and therefore the burden of proof was upon him to show that he did not know of the danger connected with this uncovered gear. We think in this the learned counsel are in error. The employee is only presumed to assume the dangers usually attendant upon his employment; and when he shows that he has been injured by a cause or danger not usually or reasonably attendant upon his employment, he is then entitled to recover, unless it be shown that he knew of such unusual and unreasonable danger, and fully comprehended its nature, at the time of his employment or before the accident happened. The evidence in this case having established the fact that the injury to the plaintiff was caused by a danger which ought not to have attended his employment, and would not have attended it if the defendant had performed its whole duty towards him, there is no presumption that the plaintiff assumed the unusual risk, and the burden of proof is on the defendant to show affirmatively that he did, to the same extent that it is on the defendant to show any other contributory negligence on the part of the plaintiff. The assumption of an unusual risk in any employment, by the employee, is in the nature of negligence on his part, which, like any other contributory negligence, prevents his recovery.

In the case of *Swoboda v. Ward*, 40 Mich. 420, 424, the learned court say: "Where the servant shows that the injury he received was in consequence of an increased risk, — one not ordinarily incident to the employment, — growing out of the master's negligence, the burden of proof is upon the master to show that the servant knew of and understood the increased danger." The same rule was laid down by this court, in an opinion by the late learned Chief Justice Ryan, in *Dorsey v. Phillips & C. Const. Co.*, 42 Wis. 583. In that case the learned chief justice said, speaking of the plaintiff in that action: "If he knew, or ought reasonably to have known, the

precise danger to him, in the course of his employment, of the cattle-chute in question, and saw fit, notwithstanding, to continue in his employment, he might be held to have assumed the extraordinary risk, as well as the ordinary risks, of his service. . . . But it appears to us that this consequence of acquiescence ought to rest upon positive knowledge . . . of the precise danger assumed, not on vague surmise of the possibility of danger." In *Rummell v. Dilworth*, 111 Pa. St. 343, 351, the court say: "The plaintiff cannot be supposed or assumed to have accepted in advance a peril which he could not estimate, and the extent of which, for lack of experience, he could not have known. Where there is any doubt whether the employee was acquainted, or ought to have been acquainted, with the risk, the determination of the question is necessarily for the jury." See also *Cooley on Torts*, 661, and cases cited.

Undoubtedly, the correct rule of law has been laid down in the cases above cited. The authorities sustaining the rule are very numerous. Under the rule, as above stated, upon a finding supported by the evidence that the defendant was in default in not furnishing a safe place for the plaintiff to do his work, and the injury to the plaintiff having occurred from its default in that respect, the plaintiff was entitled to recover, unless it was shown by competent evidence that the plaintiff knew of the dangerous gearing in his immediate vicinity, and fully comprehended its dangerous character. The only evidence in the case tending to show that he knew of the danger or comprehended it was the fact that he had worked near it for five days before the accident happened, and might have discovered it if he had looked for it. The plaintiff testified that he did not know of its existence until he was caught by it.

Upon this state of the case, the court could not say, as a matter of law, that he did know of its existence, or that he comprehended its dangerous character. There was the fact that he had worked five days very near it, and could have seen it if his attention was called to it; but this evidence is opposed by the statement of plaintiff, under oath, that he did not see or know of its existence. The learned counsel for the appellant insist that it is absurd to say the plaintiff did not know of its existence. We do not think it is necessarily so. This young man, with no experience or knowledge of the machinery of a mill, and having no reason for supposing that there was any dangerous machinery in his vicinity, and while

in the mill at work, having his attention constantly turned in another direction, might easily have failed to observe this particularly dangerous piece of machinery. The noise and confusion of sounds in a great saw-mill, when running, would distract the attention of one wholly unaccustomed to work in it; and he would be very likely to keep his attention fixed upon the work he had to do, rather than to be looking about him to see how the machinery was placed, or to discover its dangerous character. In any view of the case, it was a question for the jury, upon the evidence: *Hathaway v. Michigan C. R'y Co.*, 51 Mich. 253; 47 Am. Rep. 569; *Huizega v. Cutler & S. Lumber Co.*, 51 Mich. 272. The jury having found in favor of the plaintiff, upon what appears to be sufficient evidence, this court cannot reverse the judgment on the ground that it is not supported by the evidence.

The only other questions in the case are the exceptions of the defendant to the evidence offered by the plaintiff, and to the instructions of the court to the jury.

The plaintiff offered the evidence of witnesses to show that it was customary in other saw-mills to cover gearing of the kind in question. This was clearly competent on the question as to whether the defendant was negligent in not covering it in its mill: See *Huizega v. Cutler & S. Lumber Co.*, 51 Mich. 276; *Swoboda v. Ward*, 40 Mich. 423.

To our minds, it was hardly necessary to call experts to prove that this piece of machinery, placed as it was, ought to have been covered. There was no error in permitting the witnesses to testify that this gearing could have been covered on the side. That was a fact perfectly plain to any one; and the only real question was, whether it could have been so covered without interfering with its usefulness. If it could, common prudence required that it should be covered.

The testimony of Paul King was objected to. He was present when the defendant employed the plaintiff, and King was called to state what was said at the time between the foreman and the plaintiff's brother. It seems the plaintiff could not talk English, but his brother could, and he did the talking with the foreman, and interpreted it in French to his brother and King. King was permitted to state what the brother of the plaintiff said at the time as to what the foreman said as to giving him a safe place, or there being no danger. It is understood that what is said to a person who acts as an interpreter between the person speaking and other third parties

will be repeated to such other parties in the language which they understand. The person speaking through an interpreter virtually says to such other person, "You listen to what the interpreter says, and he will tell you what I say"; and what the interpreter says is to be taken as the language of the person speaking through him, and may therefore be admitted in evidence against him, under the rule that the statement of a third person is receivable in evidence against a party who has expressly referred another to him for information as to any matter: See 1 Greenl. Ev., secs. 182, 183. The evidence was properly received.

The learned counsel excepted to the instructions of the court to the jury; and, as we read the printed case, all the instructions were generally excepted to. After a careful reading of the instructions, they appear to be a correct statement of the law applicable to the facts of the case, and are, on the whole, sufficiently favorable to the defendant.

It is also urged that the damages assessed are excessive. Although the verdict is large, there is no just reason for saying that they are out of proportion to the injury received by this young man. The loss that he has sustained is one that no amount of money can fully compensate. Although the sum awarded him may be a heavy burden for the defendant to carry, it certainly cannot be said that it is more than a just compensation for the plaintiff's injury.

On the whole, the case seems to have been fairly tried, and we find no errors in the record which call upon this court to reverse the judgment.

The judgment of the circuit court is affirmed.

MASTER AND SERVANT — MASTER'S DUTY TO SERVANT. — The master must furnish to his servant a safe place in which to work: *Van Dusen v. Letellier*, 78 Mich. 493; and safe machinery and appliances: *McDonald v. Chicago etc. R'y Co.*, 41 Minn. 439; 16 Am. St. Rep. 711, and note; the general rule being that the master must exercise towards his servant the same care and caution as an ordinarily prudent person would exercise under similar circumstances: *Austin etc. R'y Co. v. Beatty*, 73 Tex. 592; *Hoffman v. Dickinson*, 31 W. Va. 142. The master should point out to his servant unusual and peculiar dangers, as well as any extra hazards to which he may be exposed: *Missouri Pacific etc. R'y Co. v. White*, 76 Tex. 102; 18 Am. St. Rep. 33; *Myhan v. Louisiana Electric etc. Co.*, 41 La. Ann. 964; 17 Am. St. Rep. 436. The master is responsible for negligence in the performance of his duties to his servants, notwithstanding he may have delegated the performance thereof to another: *Landrill v. Woods*, 41 Minn. 213; *Van Dusen v. Letellier*, 78 Mich. 493.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE OF SERVANT.—To maintain an action against his master for injuries caused by defects in machinery, etc., the servant must be able to show, — 1. Fault or knowledge of defects on the part of his master; 2. Absence of fault, or ignorance, on the part of the servant: *Carey v. Sellers*, 41 La. Ann. 500; *Hoffman v. Dickinson*, 31 W. Va. 143. For contributory negligence on the part of the servant will prevent his recovery: *Columbus etc. R'y Co. v. Bradford*, 86 Ala. 574; *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 589; *Probert v. Phipps*, 149 Mass. 258; *Alexander v. Louisville etc. R. R. Co.*, 83 Ky. 589. An employee doing what he is ordered to do by the master is not at fault: *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 588; and so is he protected when obeying the orders of the foreman: *Weiden v. Brush Electric L. Co.*, 73 Mich. 268.

MASTER AND SERVANT—RISKS ASSUMED BY SERVANT.—A servant who enters an employment from its nature dangerous assumes the ordinary risks incident to the employment, and the risks of the open, visible structures known to him, or which he might know by the use of ordinary care and observation: *Rogers v. Galveston City R'y Co.*, 76 Tex. 503; *Doyle v. St. Paul etc. R'y Co.*, 42 Minn. 80; *Balle v. Detroit L. Co.*, 73 Mich. 158; *Fisher v. Chicago etc. R'y Co.*, 77 Mich. 546; *Williams v. D. L. & W. R. R. Co.*, 116 N. Y. 629; *Melzer v. Car Co.*, 76 Mich. 94. And when he enters into or continues in employment, with notice of defects and knowledge of extraordinary risks, he is deemed to have assumed such additional risks: *Carbine v. Bennington etc. R'y Co.*, 61 Vt. 348; *Carey v. Sellers*, 41 La. Ann. 500; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261; *Smith v. Winona etc. R. R. Co.*, 42 Minn. 87; *Vaughn v. California C. R'y Co.*, 83 Cal. 18; *Young v. Burlington etc. Co.*, 79 Iowa, 415.

MASTER AND SERVANT.—**CONTRIBUTORY NEGLIGENCE** on the part of a servant, in an action by him against his master for negligence, is a question of fact for the jury to determine: *Smith v. Dunham*, 74 Mich. 310.

STATE v. DISTRICT BOARD OF SCHOOL DISTRICT NO. 8 OF THE CITY OF EDGERTON.

[76 WISCONSIN, 177.]

CONSTITUTIONAL LAW—BIBLE-READING IN COMMON SCHOOLS—SUFFICIENCY OF PETITION.—A petition for a writ of *mandamus* to compel the discontinuance of the reading of the Bible in the common schools, alleging that petitioners are taxed for the support of such schools, and are equally entitled to the benefit thereof, and that such reading therein is contrary to the rights of conscience, is sectarian instruction, and is prohibited by section 3 of article 10 of the Wisconsin constitution, is sufficiently broad to cover any valid objection which may be made to such reading.

CONSTITUTIONAL LAW—BIBLE-READING IN COMMON SCHOOLS—ALLEGATIONS NOT ADMITTED BY DEMURRER.—Allegations in the answer to a petition for a writ of *mandamus* to compel the discontinuance of Bible-reading in the common schools, that such reading is not sectarian education, and that there is no material difference between the King James version of the Bible read in such schools, and the Douay version, are not admitted by demurrer. The former allegation is a conclusion of law, while the latter is not well pleaded, being against common knowledge.

COURTS WILL TAKE JUDICIAL NOTICE OF CONTENTS OF BIBLE, that the religious world is divided into numerous sects, and of the general doctrines maintained by each sect.

CONSTITUTIONAL LAW — BIBLE-READING IN COMMON SCHOOLS. — The reading of any version of the whole Bible in the common schools as a text-book, without restriction, and though not accompanied by any comment by the instructor, is "sectarian instruction" within the meaning of section 3, article 10, of the Wisconsin constitution, and is thereby prohibited; nor is the prohibition removed by the fact that any child may withdraw from such school-room during such reading.

CONSTITUTIONAL PROHIBITION AGAINST THE READING OF THE BIBLE in common schools as a text-book does not extend to such other text-books as are founded upon the fundamental teachings of the Bible, or which contain extracts therefrom, not sectarian in their nature.

CONSTITUTIONAL LAW — BIBLE-READING IN PUBLIC SCHOOLS. — Where the constitutional prohibition against sectarian education in the common schools is framed in clear and unambiguous words, such words are controlling rather than an interpretation in the light of surrounding facts existing at the time of the adoption of such constitution. The reading of the Bible in such schools, as a text-book, need not be specifically included in the constitutional prohibition against sectarian instruction therein, in order that such reading may be excluded by its terms.

CONSTITUTIONAL LAW — BIBLE-READING IN COMMON SCHOOLS, as a text-book, is religious worship, and constitutes the school-house, for the time being, a place of worship, and such reading during school hours, against the consent of a tax-payer, compels him to support a place of worship within the meaning of section 18 of article 1 of the Wisconsin constitution, declaring that "no man shall be compelled . . . to erect or support any place of worship."

CONSTITUTIONAL LAW. — **BIBLE-READING IN COMMON SCHOOLS**, as a text-book, is sectarian instruction, and the money drawn from the state treasury for the support of such schools, where such reading is practiced, is "for the benefit of a religious seminary," within the meaning of section 18, article 1, of the constitution of Wisconsin, prohibiting such appropriation of the state funds.

Winans and Hyzer, J. H. M. Wigman, and Humphrey J. Desmond, for the petitioners.

J. P. Towne and A. A. Jackson, for the respondent.

LYON, J. The petitioners are residents and tax-payers of the city of Edgerton, and their children are pupils in the public schools of that city. They allege in their petition that certain of the teachers, employed by the district board having charge of such schools, read daily to the pupils therein, during school hours, certain portions of King James's version of the Bible, selected by the teachers; and that the petitioners have requested the district board to require the teachers to discontinue such practice, but the board refuses to do so. The petitioners further allege that such practice is a violation of certain provisions of the constitution of this state, hereinafter

more particularly mentioned, and pray that a writ of *mandamus* may issue from the circuit court to the school board, commanding such board to cause the teachers to discontinue the practice and exercises complained of.

Upon the filing of such petition in the circuit court, the usual alternative writ of *mandamus* was issued and served upon the school board. The board made return to such writ by filing an answer to the petition, admitting the existence of the practice complained of, and the refusal of the board to cause it to be discontinued, denying the authority of the board to interfere with the practice, and alleging that the practice is legal and proper, and that the Bible is a duly authorized and selected text-book for use in said schools. Further statement of the contents of the petition and answer is hereinafter made. The petitioners demurred to the answer of the school board, alleging, as ground of demurrer, that the answer fails to state facts showing that a peremptory writ of *mandamus*, as prayed, should not issue. The circuit court overruled the demurrer, and the petitioners appealed to this court from the order in that behalf.

The questions which must be adjudicated on this appeal have been argued by the respective counsel with great ability, and with all the earnestness of intense personal conviction. The arguments and the opinion of the learned circuit judge overruling the demurrer to the answer of the respondent show great learning and historical research, and have been valuable to us in our deliberations upon the case.

The constitutional objections urged by the petitioners to the reading of the Bible in the district schools are, that, — 1. It violates the rights of conscience; 2. It compels them to aid in the support of a place of worship against their consent (Const., sec. 18, art. 1); 3. It is sectarian instruction: Const., art. 10, sec. 3.

This opinion will be confined quite closely to a discussion of the question whether the adoption of the Protestant, or King James, version of the Bible, or any version thereof, in the public schools in the city of Edgerton, as a text-book, and the reading of selections therefrom in those schools at the times and in the manner stated in the answer, is sectarian instruction, within the meaning of that term as used in section 3, article 10, of the constitution, which ordains that no sectarian instruction shall be allowed in the district schools of this state.

1. Some questions as to the effect of the demurrer upon certain allegations in the answer of the respondent to the petition for a writ of *mandamus* will first be considered. It is a familiar rule that a demurrer to any pleading reaches back through the whole record, and seizes hold of the first defective pleading. In this case, the petition for a writ of *mandamus*, and the answer of the school board thereto, constitute the pleadings. Hence, if the petition is insufficient, judgment on the demurrer to the answer should go for the respondent, although the answer may also be insufficient. This rule is invoked by the learned counsel for the respondent.

It best comports with the gravity and importance of the case to fully consider and determine it upon the merits, to the end that the controversy which has grown out of the practice complained of be put at rest in this state. Hence no narrow or technical construction of the pleadings should prevail which will defeat or postpone a final adjustment of the controversy.

The petitioners are members of the Roman Catholic Church, and believers in its doctrines. Hence it is quite natural that most of the averments in their petition should be made, as they in fact are, from the stand-point of such doctrines. But should it be held that members of that church have no valid grounds, as such, for their objections to the reading of the Bible in the district schools, still, the petition contains general averments sufficiently broad to cover any valid objection to such reading, which might be made by any citizen of the state aggrieved by the action of the school board. These averments are, "that the residents of said city of Edgerton, who are taxed for the support of said schools, are equally entitled to the benefits thereof, by having their children instructed therein according to law"; and that such reading of the Bible "is contrary to the rights of conscience, and wholly contrary to and in violation of the law; and that your petitioners believe such exercises as above set forth, and each and all of them, are sectarian instruction, and in violation of section 3, article 10, of the constitution of the state of Wisconsin."

The answer contains several averments which counsel claim are admitted by the demurrer, but which are mere legal conclusions from facts stated therein; such as that the reading of the Bible in schools is not sectarian instruction, or that the school board have lawful right to permit, and none to prevent, such reading of the same. Averments of this kind, or of facts

not well pleaded, are not admitted by a general demurrer to the pleading: 5 Am. & Eng. Ency. of Law, 551, and cases cited in note 6.

It is averred in the return that there is no material difference between the King James version of the Bible, used in the Edgerton schools, and the Douay version, which is the only one recognized by the Catholic Church as correct and complete. It is universally known that there are differences between these two versions, in many particulars, which the respective sects regard as material. Hence the averment is against common knowledge, and therefore not well pleaded.

Our conclusion is, that if such reading of the Bible is sectarian instruction, or if it violates any other constitutional right of any citizen or sect, the petition is sufficient.

2. In considering whether such reading of the Bible is sectarian instruction, the book will be regarded as a whole, because the whole Bible, without exception, has been designated as a text-book for use in the Edgerton schools, and the claim of the school board is, substantially (although perhaps not in terms), that the whole contents thereof may lawfully be so read therein, if the teachers so elect. This being so, it is quite immaterial if the portions thereof set out in the return as the only portions thus far read are not sectarian. Yet it should be observed that some of the portions so read seem to inculcate the doctrines of the divinity of Jesus Christ, and the punishment of the wicked after death, which doctrines are not accepted by some religious sects.

3. The courts will take judicial notice of the contents of the Bible, that the religious world is divided into numerous sects, and of the general doctrines maintained by each sect; for these things pertain to general history, and may fairly be presumed to be subjects of common knowledge: 1 Greenl. Ev., secs. 5, 6, and notes. Thus they will take cognizance, without averment, of the facts that there are numerous religious sects called Christians, respectively maintaining different and conflicting doctrines; that some of these believe the doctrine of predestination, while others do not; some the doctrine of eternal punishment of the wicked, while others repudiate it; some the doctrines of the apostolic succession and the authority of the priesthood, while others reject both; some that the Holy Scriptures are the only sufficient rule of faith and practice, while others believe that the only safe guide to human thought, opinion, and action is the illuminating power of the divine

spirit upon the humble and devout heart; some in the necessity and efficacy of the sacraments of the church, while others reject them entirely; and some in the literal truth of the Scriptures, while others believe them to be allegorical, teaching spiritual truths alone, or chiefly. The courts will also take cognizance of numerous other conflicts of doctrine between the sects; also that there are religious sects which reject the doctrine of the divinity of Christ, among which is the Hebrew or Jewish sect, which denies the inspiration and authority of the New Testament; and further, that the sect known as the "Latter-day Saints," or "Mormons," while accepting the Bible, is reputed to believe the Book of Mormon, and the deliverances of its own alleged prophets, to be of equal authority therewith. Many, if not most, of the above sects include within their membership citizens of Wisconsin. A great majority, if not all, of them base their peculiar doctrines upon various passages of Scripture, which may reasonably be understood : s supporting the same.

It should here be said that the term "religious sect" is understood as applying to people believing in the same religious doctrines, who are more or less closely associated or organized to advance such doctrines and increase the number of believers therein. The doctrines of one of these sects which are not common to all the others are sectarian; and the term "sectarian" is, we think, used in that sense in the constitution.

4. Counsel for the school board maintain, in their argument, that the Christian religion is part of the common law of England; that the same was brought to this country by the colonists, and by virtue of the various colonial charters was embodied in the fundamental laws of the colonies; that this religious element or principle was incorporated in the various state constitutions, and in the ordinance of 1787 for the government of the Northwest Territory, by virtue of which ordinance it became the fundamental law of the territory of Wisconsin. Numerous quotations are given by him from the above documents, from the utterances of Congress and legislatures, and from the writings of our early statesmen, to prove these propositions. That the learned counsel have fairly demonstrated their accuracy is freely conceded. More than that, counsel have proved that many, probably most, of those charters, and some of the state constitutions, not only ordained and enforced some of the principles of the Christian religion, but sectarian doctrines as well.

They have also attempted, at considerable length, to show that the Church of Rome is hostile to our common-school system. This court neither affirms nor denies the accuracy of this position. Moreover, counsel on both sides have argued, to some extent, as to whether certain religious dogmas are true or false.

None of these matters are material or pertinent to the questions to be determined on this appeal. This case must be decided under the constitution and laws of this state now in force; and it is entirely immaterial to the decision thereof whether the interference of the courts to compel a faithful execution of the law by school boards is invoked by those who are hostile or friendly to our common-school system. The question is, What is the law of the case? not, What opinions are entertained by those who demand its enforcement? It is scarcely necessary to add that we have no concern with the truth or error of the doctrines of any sect. We are only concerned to know whether instruction in sectarian doctrines has been, or under existing regulations is liable to be, given in the district schools of the state, and especially in the public schools of the city of Edgerton.

5. We come now to the more direct consideration of the merits of the controversy. The term "sectarian instruction," in the constitution, manifestly refers exclusively to instruction in religious doctrines, and the prohibition is only aimed at such instruction as is sectarian; that is to say, instruction in religious doctrines which are believed by some religious sects and rejected by others. Hence to teach the existence of a Supreme Being of infinite wisdom, power, and goodness, and that it is the highest duty of all men to adore, obey, and love Him, is not sectarian, because all religious sects so believe and teach. The instruction becomes sectarian when it goes further, and inculcates doctrine or dogma concerning which the religious sects are in conflict. This we understand to be the meaning of the constitutional prohibition.

That the reading from the Bible, in the schools, although unaccompanied by any comment on the part of the teacher, is "instruction," seems to us too clear for argument. Some of the most valuable instruction a person can receive may be derived from reading, alone, without any extrinsic aid by way of comment or exposition. The question, therefore, seems to narrow down to this: Is the reading of the Bible in the schools — not merely selected passages therefrom, but the

whole of it — sectarian instruction of the pupils? In view of the fact already mentioned, that the Bible contains numerous doctrinal passages, upon some of which the peculiar creed of almost every religious sect is based, and that such passages may reasonably be understood to inculcate the doctrines predicated upon them, an affirmative answer to the question seems unavoidable. Any pupil of ordinary intelligence who listens to the reading of the doctrinal portions of the Bible will be more or less instructed thereby in the doctrines of the divinity of Jesus Christ, the eternal punishment of the wicked, the authority of the priesthood, the binding force and efficacy of the sacraments, and many other conflicting sectarian doctrines. A most forcible demonstration of the accuracy of this statement is found in certain reports of the American Bible Society of its work in Catholic countries (referred to in one of the arguments), in which instances are given of the conversion of several persons from “Romanism” through the reading of the Scriptures alone; that is to say, the reading of the Protestant, or King James, version of the Bible converted Catholics to Protestants without the aid of comment or exposition. In those cases the reading of the Bible certainly was sectarian instruction. We do not know how to frame an argument in support of the proposition that the reading thereof in the district schools is not also sectarian instruction.

It should be observed, in this connection, that the above views do not, as counsel seemed to think they may, banish from the district schools such text-books as are founded upon the fundamental teachings of the Bible, or which contain extracts therefrom. Such teachings and extracts pervade and ornament our secular literature, and are important elements in its value and usefulness. Such text-books are in the schools for secular instruction, and rightly so; and the constitutional prohibition of sectarian instruction does not include them, even though they may contain passages from which some inferences of sectarian doctrine might possibly be drawn.

Furthermore, there is much in the Bible which cannot justly be characterized as sectarian. There can be no valid objection to the use of such matter in the secular instruction of the pupils. Much of it has great historical and literary value, which may be thus utilized without violating the constitutional prohibition. It may also be used to inculcate good morals, — that is, our duties to each other, — which may and ought to be inculcated by the district schools. No more com-

plete code of morals exists than is contained in the New Testament, which reaffirms and emphasizes the moral obligations laid down in the Ten Commandments. Concerning the fundamental principles of moral ethics, the religious sects do not disagree.

6. It is urged on behalf of the school board that the constitution must be interpreted in the light of the surrounding circumstances existing when it was framed and adopted, and that contemporaneous exposition thereof is of great authority. Cases in this court and elsewhere are cited to these propositions. Undoubtedly they are correct rules of interpretation, applicable alike to constitutions, statutes, and all written instruments, where the language employed is of uncertain import; but if the words of the instrument are unambiguous there is no room for construction outside the words themselves, and the above rules cease to be controlling or important. It is proper, however, to consider the constitutional prohibition in the light of such rules of interpretation.

On the subject of contemporaneous exposition, counsel refer us to the uniform action of the department of public instruction in this state from 1858 to the present time, recommending the Bible as a text-book in the district schools, as evidence that the constitutional provision under consideration was not understood by the framers of that instrument, or the people who adopted it, as excluding from such schools the reading of the Bible. The action of that department upon the subject, showing, as it does, the opinions of the eminent scholars and teachers who have presided over it for a long series of years, is entitled to great weight, and on a doubtful question of construction would doubtless be held controlling. But we do not think the true interpretation of the constitutional provision under consideration is doubtful or uncertain, or that any extraneous aid is required in order to interpret it correctly. Hence our judgment cannot properly be controlled by the action of the department of public instruction or the opinions of its learned chiefs. The fact probably is, that the practice of Bible-reading in the district schools was not seriously challenged at the outset, and not subjected to close legal scrutiny until the policy of the department had become fixed. It was but natural that such policy should, to some extent at least, be thereafter adhered to.

It is further said that the practice of reading the Bible in the district schools prevailed generally after the adoption of

the constitution. This is claimed to be a most persuasive fact, showing that it was not the intention of the framers of the constitution, and the people, to prohibit the practice. We do not know how the fact was, but we must be permitted to doubt whether the practice was ever a general one in the district schools of the state. We are quite confident that it is not so at the present time. It was said in argument, and not denied, that the practice does not prevail in the public schools in any of the larger cities in the state. But were the fact otherwise, for the reasons above stated it would not be controlling.

It may not be uninteresting to consider, somewhat, certain other circumstances, existing when the constitution was adopted, which may fairly be presumed to have influenced the inserting therein of the provision against "sectarian instruction" in the district schools. The early settlers of Wisconsin came chiefly from New England and the Middle States. They represented the best religious, intellectual, and moral culture, and the business enterprise and sagacity, of the people of the states from whence they came. They found here a territory possessing all the elements essential to the development of a great state. They were intensely desirous that the future state should be settled and developed as rapidly as possible. They chose from their number wise, sagacious, Christian men, imbued with the sentiments common to all, to frame their constitution. The convention assembled at a time when immigration had become very large and was constantly increasing. The immigrants came from nearly all the countries of Europe, but most largely from Germany and Ireland. As a class, they were industrious, intelligent, honest, and thrifty, — just the material for the development of a new state. Besides, they brought with them, collectively, much wealth. They were also religious and sectarian. Among them were Catholics, Jews, and adherents of many Protestant sects. These immigrants were cordially welcomed, and it is manifest the convention framed the constitution with reference to attracting them to Wisconsin. Many, perhaps most, of these immigrants came from countries in which a state religion was maintained and enforced, while some of them were non-conformists, and had suffered under the disabilities resulting from their rejection of the established religion. What more tempting inducement to cast their lot with us could have been held out to them than the assurance that, in addition to the guaranties of the right of conscience and of worship in their own way,

the free district schools in which their children were to be or might be educated were absolute common ground, where the pupils were equal, and where sectarian instruction, and with it sectarian intolerance, under which they had smarted in the old country, could never enter? Such were the circumstances surrounding the convention which framed the constitution. In the light of them, and with a lively appreciation by its members of the horrors of sectarian intolerance, and the priceless value of perfect religious and sectarian freedom and equality, is it unreasonable to say that sectarian instruction was thus excluded, to the end that the child of the Jew or Catholic or Unitarian or Universalist or Quaker should not be compelled to listen to the stated reading of passages of Scripture which are accepted by others as giving the lie to the religious faith and belief of their parents and themselves?

It is argued that the reading of the Bible in the district schools is not included in the constitutional prohibition of sectarian instruction therein, because the Bible is not specifically mentioned in the constitution. It is said that if it was intended that such reading was to be excluded, it would have been so provided in direct terms. The argument may be plausible, but is believed to be unsound. Constitutions deal with general principles and policies, and do not usually descend to a specification of particulars. Such is the character of the provision in question. In general terms it excludes sectarian instruction, and the exclusion includes all forms of such instruction. Its force would or might have been weakened had the attempt been made to specify therein all the methods by which such instruction may be imparted.

We have a statute upon this general subject which must not be overlooked. Section 3, chapter 251, Laws of 1883, amending section 514, Revised Statutes, provides that in cities "no text-books shall be permitted in any free public schools which will have a tendency to inculcate sectarian ideas." Of course, this applies to the public schools of the city of Edgerton. This statute certainly emphasizes the constitutional prohibition, although it may not extend its scope. It is, in effect, a legislative declaration that the use of text-books which have "a tendency to inculcate sectarian ideas" is sectarian instruction, prohibited by the constitution.

For the reasons above stated, we cannot doubt that the use of the Bible as a text-book in the public schools, and the stated reading thereof in such schools, without restriction, "has a

tendency to inculcate sectarian ideas," and is sectarian instruction within the meaning and intention of the constitution and the statute.

7. The answer of the respondent states that the relators' children are not compelled to remain in the school-room while the Bible is being read, but are at liberty to withdraw therefrom during the reading of the same. For this reason, it is claimed that the relators have no good cause for complaint, even though such reading be sectarian instruction. We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument, that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.

8. The foregoing views render unnecessary any extended discussion of the question whether such reading of the Bible is or may be a violation of the rights of conscience guaranteed by section 18 of the bill of rights: Const., art. 1. There has been considerable discussion concerning the limitations of that right. That there are limitations thereto must be conceded. For example, a Mormon may believe that the practice of polygamy is a religious duty; yet no court would regard his conscience in that behalf for a moment, should he put his belief into practice.

The petition alleges that, in addition to their objections to the King James version, the relators have conscientious scruples against the reading of any version of the Bible to their children, either in the district schools or elsewhere, without authoritative note, comment, or exposition, because the practice may lead their children to adopt dangerous errors, and irreligious faith, practice, and worship. When we remember that wise and good men have struggled and agonized through the centuries to find the correct interpretation of the Scriptures, employing to that end all the resources of great intellectual power, profound scholarship, and exalted spiritual attainment, and yet with such widely divergent results; and

further, that the relators conscientiously believe that their church furnishes them means, and the only means, of correct and infallible interpretation,—we can scarcely say their conscientious scruples against the reading of any version of the Bible to their children, unaccompanied by such interpretation, are entitled to no consideration.

But, however this may be, it may safely be said, and nothing further need be said upon the subject, that when a man's conscience coincides with the law, and he obeys its dictates, he will be protected.

9. Whether the reading of the Bible in the public schools is religious worship, and whether it constitutes the school-house, for the time being, a place of worship, and if so, whether such reading during school hours as a school exercise, against the consent of a tax-payer, compels him to support a place of worship, within the meaning of section 18 of the bill of rights, are questions which will not be here discussed. These questions are considered in an opinion by Mr. Justice Cassoday, filed herewith.

10. A number of cases in different states, supposed to have a bearing upon the main question here considered and determined, have been cited, and quotations made therefrom at considerable length by the respective counsel, and by the circuit judge in his elaborate opinion overruling the demurrer to the answer. None of the states in which those decisions were made seem to have in their constitutions a direct prohibition of sectarian instruction in the public schools. It is believed that this state was the first which expressly embodied the prohibition in its fundamental law, and we are not aware of any direct adjudication of the question under consideration, by any court previously to Judge Bennett's decision in this case, except (as we are informed) the late Judge Stewart decided, in some case before him in the circuit court of Sauk County (but at what time we are not advised), that the constitution prohibits the reading of the Bible in the district schools. Practically, therefore, we are now determining a question of first impression, and it must necessarily be determined upon general principles of law. Cases from which only mere inferences, more or less remote, can be deduced, afford but little aid to correct judgment in this case. Hence the cases cited have not been specially referred to in this opinion. Some of them are nearer in point on the question considered

by Mr. Justice Cassoday, and he has referred to and commented upon them in his opinion.

11. The drift of some remarks in the argument of counsel for the respondent, and perhaps also in the opinion of Judge Bennett, is, that the exclusion of Bible-reading from the district schools is derogatory to the value to the Holy Scriptures, a blow to their influence upon the conduct and consciences of men, and disastrous to the cause of religion. We most emphatically reject these views. The priceless truths of the Bible are best taught to our youth in the church, the Sabbath and parochial schools, the social religious meetings, and above all, by parents in the home circle. There those truths may be explained and enforced, the spiritual welfare of the child guarded and protected, and his spiritual nature directed and cultivated, in accordance with the dictates of the parental conscience. The constitution does not interfere with such teaching and culture. It only banishes theological polemics from the district schools. It does this, not because of any hostility to religion, but because the people who adopted it believed that the public good would thereby be promoted, and they so declared in the preamble. Religion teaches obedience to law, and flourishes best where good government prevails. The constitutional prohibition was adopted in the interests of good government; and it argues but little faith in the vitality and power of religion to predict disaster to its progress because a constitutional provision, enacted for such a purpose, is faithfully executed.

The order of the circuit court overruling the demurrer of the relators to the answer of the school board must be reversed, and the cause remanded, with directions to that court to give judgment for the relators on the demurrer, awarding a peremptory writ of *mandamus*, as prayed in the petition.

CASSODAY, J. The gravity of the questions involved in this case is fully appreciated. They have received the careful consideration of all the members of the court. The writing of the formal opinion has fallen to the lot of Mr. Justice Lyon. At his suggestion, a separate presentation of one branch of the case is here made. Before entering upon its direct discussion, however, but as leading to it, a few general observations may not be wholly unprofitable.

It is undoubtedly true, as once observed by Mr. Justice Baldwin, that "in the construction of the constitution we

must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief, and the remedy": *Rhode Island v. Massachusetts*, 12 Pet. 723. A few years later, Mr. Justice Story said: "Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed": *Prigg v. Pennsylvania*, 16 Pet. 610, 611. These observations were, of course, made with reference to our federal constitution, but they are equally applicable to our state constitution. In so far as the rules there suggested may aid in the construction of the provisions of our constitution here involved, they may properly be invoked. It is probably in this view that counsel have dwelt so extensively upon the history of the Christian church, and its *status* under different charters and constitutions; although much of it has a very remote, if any, bearing upon the questions here presented.

All are familiar with the fact that the Jews, in the time of the apostles, were divided into "the sect of the Sadducees," and "the sect of the Pharisees." Paul declared, in the presence of Agrippa, "that, after the straitest sect" of their religion, he had "lived a Pharisee"; and when Tertullus charged him with being "a ringleader of the sect of the Nazarenes," he boldly confessed "that after the way which they" called "heresy," or as the new version has it, "a sect," he had worshiped or served the God of his fathers; and afterwards, to the "chief of the Jews," at Rome, he discoursed "concerning this sect," and persuaded "them concerning Jesus, both from the law of Moses and from the prophets." Of course, "the sect of the Nazarenes" subsequently acquired the more honorable name of "Christians." As the centuries rolled on, and Christians became more numerous, disputes arose among themselves, from time to time, in matters of faith, doctrine, practice, and interpretation of certain passages of Scripture; and these led to repeated divisions and subdivisions, until the different sects of Christians became very numerous. There is no purpose here of indicating that the Holy Scriptures,—the Old and New Testament,—if considered as a whole and fully comprehended, would exclude from the promises therein contained any of the human race com-

plying with the essential conditions therein prescribed; but since every translation made by man must be more or less imperfect, and since the application of particular passages is liable to be made with partial apprehension and biased or even distorted judgment, it is easy to perceive how texts of Scripture may be read with such an emphasis and tone as to become excessively sectarian. While the members of any particular sect may be willing to have one of their own number read the Bible in the public schools, yet they are not always willing to concede the same to a member of a sect believing in an opposite faith or doctrine. But the law is impartial, and has given no rights to any one sect that are not equally secured to every other.

The relation of the church to the Scriptures has been a subject of controversy ever since the Reformation. Upon that question even Protestants have differed. Some have gone so far as to say that "the Bible, and the Bible only, is the religion of Protestants"; while others have declared that "the living church is more than the dead Bible, for it is the Bible and something more." The relations of church and state have been the subject of discussion for many centuries; and at certain times, and in certain nations of Europe, one particular sect has been the established church of the state, and at other times or in other nations the belief of some other sect has been the established religion; while other sects, not so favored, were either exterminated altogether or permitted to remain on conditions more or less disagreeable and humiliating. These discriminations naturally generated bitterness, enmities, and even cruel war among brethren. Many of the early immigrants to this country had felt the despotism of such intolerance, and came hither in consequence of it. They came from different countries of Europe, and consequently had experienced different types of intolerance. Some of them were as narrow-minded in such matters as their oppressors had been, and hence no sooner acquired civil power than they themselves became intolerant towards all sects except their own.

Such divisions, controversies, and contentions among professing Christians were supposed by many to be repugnant to the sublime teachings and fraternal spirit revealed to the world through Jesus Christ. Many of the colonists — especially when they came to the formation of state governments — proved to be sufficiently broad and liberal to exact nothing for themselves or their particular sect that they were unwill-

ing to grant to every other citizen and his particular sect. This benign spirit seemed to extend as its wisdom became more manifest by experience. True, the constitution of South Carolina adopted in 1778 declared that the "Christian Protestant religion" was the "established religion" of that state; but that was modified in 1790, so as to secure freedom and prevent discrimination or preference in worship or religion. The constitution of North Carolina of 1776 excluded from office all non-believers in the Protestant religion or the divine authority of the Old or New Testament; while the constitution of Delaware of the same year made every official subscribe to a confession of faith; but that was abrogated sixteen years afterwards, and equal protection was extended to all sects. So the first constitutions of Maryland, Massachusetts, and New Hampshire, and later, of Connecticut, provided for the support, by taxation or otherwise, of the Christian or Protestant Christian religion, with more or less toleration guaranteed to other sects. Such direct sanction and toleration seem to have been inspired by a lingering attachment for, or a sympathy with, the European theory of union between church and state. But the several states of New Jersey, New York, Pennsylvania, Vermont, and Virginia, from the first, and later, Maine and Rhode Island, of the New England states, and every, or nearly every, state admitted into the Union after the organization of the federal government, expressly secured, in effect, in their respective state constitutions, the equal freedom of every religious sect, organization, and society, with a guaranty against preference or discrimination. So firm had become the public conviction in favor of a broad liberality and equal protection in such matters, at the time of the organization of our national government, that although the federal constitution as originally adopted did not mention or refer to the subject, yet the first session of the first Congress proposed the first amendment to that instrument, prohibiting Congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof," notwithstanding no power had therein been granted to enact such a law, and no such law could be legally enacted without such grant of power first being made.

The learned counsel for the school board contends, in effect, that the third of the "articles of compact between the original states and the people and states" carved out of the old Northwest Territory is still in force in Wisconsin; and that under

it this state is required and bound to directly foster and encourage "religion," through schools and education. Assuming such to be the meaning of the article,—which is, to say the least, debatable,—still it is only necessary here to say, in addition to what is said by my associate, that by the adoption of our state constitution and the admission of the state into the Union, that article became superseded, and ceased to be longer in force. This has, in effect, been firmly settled by the repeated decisions of the supreme court of the United States: *Pollard v. Hagan*, 3 How. 212; *Permoli v. First Municipality*, 3 How. 609; *Strader v. Graham*, 10 How. 94, 97; *Escanaba etc. Co. v. Chicago*, 107 U. S. 678; *Cardwell v. American R. Bridge Co.*, 113 U. S. 205; *Huse v. Glover*, 119 U. S. 543; *Sands v. Manistee R. Imp. Co.*, 123 U. S. 288; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 9.

The question, therefore, recurs, whether the provisions of our state constitution here involved, when construed with reference to the evils, or supposed evils, thereby sought to be suppressed, and the object or purpose thereby sought to be secured, permitted or prohibited the stated reading of the Bible as a textbook in the public schools.

Wisconsin, as one of the later states admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population, as mentioned in the opinion of my associate, has, in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union. Our state constitution expressly prohibits any religious test as a qualification for office, or the exclusion of any witness in consequence of his religious opinion: Sec. 19, art. 1. Aside from the clause just referred to, and the one against sectarian instruction so fully considered by my brother Lyon, our state constitution provides that,—1. "The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed"; 2. "Nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent"; 3. "Nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by-law to any religious establishments or modes of worship"; 4. "Nor shall any money be drawn from the treasury, for the benefit of religious societies, or religious or theological seminaries": Sec. 18, art. 1. The decisions of courts in states having no

such constitutional prohibition, of course, can have no application to the case at bar.

The question thus presented is not one of sectarian predilection, nor of religious belief, nor of theological conception, nor of sentiment, but one of fundamental law. It is no part of the duty of this court to make or unmake, but simply to construe this provision of the constitution. All questions of political and governmental ethics, all questions of policy, must be regarded as having been fully considered by the convention which framed, and conclusively determined by the people who adopted, the constitution more than forty years ago. The oath of every official in the state is to support that constitution as it is, and not as it might have been: *Wisconsin Cent. R. R. Co. v. Taylor Co.*, 52 Wis. 58; *Lake Co. v. Rollins*, 130 U. S. 672. That oath is to be kept sacred, with strict integrity of purpose, and without any sectarian, religious, or political bias or equivocation.

In considering the meaning of the section of the constitution quoted, we are to remember that canon of construction adverted to by my associate, and aptly expressed by Marshall, C. J., in these words: "Although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempt from its operation": *Sturges v. Crowninshield*, 4 Wheat. 202. Similar expressions have come to us from the same court within a year. "If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted, and neither the courts nor the legislature have the right to add to it or take from it": *Lake Co. v. Rollins*, 130 U. S. 670.

The first and third clauses of the section of the constitution quoted are similar in their scope, and may therefore be considered together. They read: 1. "The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed." 3. "Nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship." This language is quite similar to, and may have been taken in part from, the constitution of

Pennsylvania, as well as other states. In commenting upon a similar clause in the Pennsylvania constitution, in the celebrated Girard will case, Mr. Justice Story, speaking for the whole court, observed: "Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the supreme court of Pennsylvania in *Updegraph v. Com.*, 11 Serg. & R. 394": *Vidal v. Girard's Ex'rs*, 2 How. 198. In commenting upon a similar clause in the Ohio constitution, Mr. Justice Thurman, speaking for the whole court, said: "We sometimes hear it said that all religions are tolerated in Ohio; but the expression is not strictly accurate. Much less accurate is it to say that one religion is a part of our law, and all others only tolerated. It is not by mere toleration that every individual here is protected in his belief or disbelief. He reposes, not upon the leniency of government or the liberality of any class or sect of men, but upon his natural, indefeasible rights of conscience, which, in the language of the constitution, are beyond the control or interference of any human authority": *Bloom v. Richards*, 2 Ohio St. 390.

In considering the two clauses quoted from our constitution, we are to bear in mind the general proposition, conceded by all, that our state constitution is not a grant but a limitation of powers: *State ex rel. Graef v. Forest Co.*, 74 Wis. 615. Viewed in this light, and it will readily be perceived that these clauses operate as a perpetual bar to the state, and each of the three departments of the state government, and every agency thereof, from the infringement, control, or interference with the individual rights of every person, as indicated therein, or the giving of any preference by law, to any religious sect or mode of worship. They presuppose the voluntary exercise of such rights by any person or body of persons who may desire, and by implication guarantee protection in the freedom of such exercise. We neither have nor can have in this state, under our present constitution, any statutes of toleration, nor of union.

directly or indirectly, between church and state, for the simple reason that the constitution forbids all such preferences, and guarantees all such rights. But the exercise of such rights by one person, or any given number of persons, cannot be so extended as to interfere with the exercise of similar rights by other persons, nor so far as to prevent the legitimate exercise of the police powers of the state in preserving order, securing good citizenship, the administration of law, and the sabbath as a day of rest: *Stansbury v. Marks*, 2 Dall. 213; *Com. v. Wolf*, 3 Serg. & R. 48; *Com. v. Leshner*, 17 Serg. & R. 155; *McGatrick v. Wason*, 4 Ohio St. 566; *Simon's Ex'rs v. Gratz*, 2 Pen. & W. 412; 23 Am. Dec. 33; *Shover v. State*, 10 Ark. 259; *Ferriter v. Tyler*, 48 Vt. 469; *State ex rel. Walker v. Judge*, 39 La. Ann. 132. Such statutes come within no constitutional prohibition, and are founded upon an impregnable basis.

The two clauses mentioned recognize the existence of different religious establishments or sects, and different modes of worship; but they do not have so direct a bearing upon the question here presented as the second and fourth clauses, which will now be considered.

The second clause of the section quoted is to the effect that no man shall "be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent." Is the stated reading of the Bible in the public schools, as a text-book, "worship," within the meaning of this clause?

As indicated in the clauses already considered, the word "worship," as here used, includes any and every mode of worshipping Almighty God. Webster has defined it as, — "The act of paying divine honors to the Supreme Being; religious reverence and homage; adoration paid to God, or a being viewed as God. . . . 'The worship of God is an eminent part of religion, and prayer is a chief part of religious worship.'" Worcester defines it as, — "3. Adoration; a religious act of reverence; honor paid to the Supreme Being, or by heathen nations to their deities. 'Worship consists in the performance of all those external acts, and the observance of all those rites and ceremonies, in which men engage with the professed and sole view of honoring God.' . . . 'They join their vocal worship to the quire of creatures wanting voice.' . . . 4. Honor; respect; civil deference." The Imperial defines it as, — "4. Chiefly and eminently, the act of paying divine honors to the Supreme Being; or the reverence and hom-

age paid to him in religious exercises, consisting in adoration, confession, prayer, thanksgiving, and the like." The Bible dictionary declares that the "worship of God, both spiritual and visible, private and public, by individuals, families, and communities, . . . is abundantly commanded in His Word." In theology, we are told that "the honor which is due in a peculiar sense to God consists, supremely, in religious worship, in making Him the object of our supreme affection, and rendering to Him our supreme obedience": 1 Dwight's Theo. 555.

Certainly, the reading of the Holy Scriptures as the eternal Word of God, in obedience to the often-repeated injunction therein contained, whether by the individual in private, or in the family, or in the public assembly, is an essential part of divine worship. Every sermon is based upon some text of Scripture. Most prayers are preceded by the reading of some passage of Scripture, as an intelligent guide to the thoughts of the worshiper or worshipers. The Sermon on the Mount contains the prayer taught by the blessed Lord. Is it possible for any genuine believer in the Christian religion to read, or listen to the reading of, that sermon, and especially that prayer, without being filled with a holy sense of honor, reverence, adoration, and homage to Almighty God, which is the very essence of worship?

We must hold that the stated reading of the Bible, in the public schools, as a text-book, may be "worship" within the meaning of the clause of the constitution under consideration. If, then, such reading of the Bible is worship, can there be any doubt but what the school-room in which it is so statedly read is a "place of worship," within the meaning of the same clause of the constitution?

Counsel seem to argue that such place of worship should be confined to some church edifice, or place where the members of a church statedly worship. Some of the earlier constitutions, having similar clauses, used the words "building" and "church." Manifestly, the words "place of worship" were advisedly used, as applicable to any "place" or structure where worship is statedly held, and which the citizen is "compelled to attend," or the tax-payers are compelled to "erect or support." The mere fact that only a small fraction of the school hours is devoted to such worship in no way justifies such use as against an objecting tax-payer. If the right be conceded, then the length of time so devoted becomes

a matter of discretion. If such right does not exist, then any length of time, however short, is forbidden. The relators, as tax-payers of the district, were compelled to aid in the erection of the school building in question, and also to aid in the support of the school maintained therein: Sanborn and Berryman's Ann. Stats, secs. 430, 430 a. Being thus compelled to aid in such erection and support, they have a legal right to object to its being used as a "place of worship." In fact, it has been held that it can be devoted to no other use, as against an objecting tax-payer: *School Dist. v. Arnold*, 21 Wis. 657. In that case a temperance society obtained permission from a majority of the electors present at a school meeting, duly called, to hold its meetings in the school-house; but it was held that such electors had no authority to thus divert its use. The present chief justice, speaking for the court, among other things, said: "The statute has not given the board, nor the electors of the district, any authority to permit a school-house to be used for meetings of the Sons of Temperance, or anything of the kind. So the action of the electors of the district . . . was wholly unauthorized, and furnished no defense to the action." To the same effect are *Spencer v. Joint School Dist.*, 15 Kan. 259; 22 Am. Rep. 268; *Dorton v. Hearn*, 67 Mo. 301; *Scofield v. Eighth School Dist.*, 27 Conn. 499; *Weir v. Day*, 35 Ohio St. 143. There are cases of a contrary import, but it is very certain that, as against an objecting tax-payer, such school-house cannot be devoted to a use expressly forbidden by the constitution of the state; as, for instance, as a place of worship.

There is another feature of the clause we are considering which requires attention. Under our statutes the children of the relators between certain ages, were bound to attend some public or private school for a certain period of each year: Sanborn and Berryman's Ann. Stats., sec. 489 a; Laws of 1879, c. 121; Laws of 1882, c. 298; Laws of 1887, c. 73; superseded by Sanborn and Berryman's Ann. Stats. sec. 489 b; Laws of 1889, c. 519. In the case of a poor man incapable of educating his children at private expense, they are "compelled to attend" such school without the consent of themselves or their parents, notwithstanding it is, in a limited sense, a place of worship; and in the case of men of property, it might impose an unauthorized burden. This, as we understand, is prohibited by the clause of the constitution we are considering.

The fourth clause of the section of the constitution quoted

declares, in effect, that no money shall "be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." As argued by the learned counsel for the school board, the word "treasury," in this clause, probably refers to the state treasury. But we are to remember that the school in question receives annually from the state treasury its proportionate share, not only of the school-fund income: R. S., sec. 554; Laws of 1885, sec. 3, c. 124; and Laws of 1887, c. 277; but also of the one-mill tax: Sanborn and Berryman's Ann. Stats., sec. 1070 a; Laws of 1885, c. 287. The question thus recurs, whether the money thus drawn from the state treasury for the maintenance and support of the school in question is for the benefit of a religious seminary, within the meaning of this clause of the constitution. A seminary is defined by Webster as a "place of training; institution of education; a school, academy, college, or university, in which young persons are instructed in the several branches of learning, which may qualify them for their future employments." It manifestly includes institutions of learning or education of different grades. But a religious seminary of any one grade is just as effectually forbidden as a religious seminary of any higher or other grade. The thing that is prohibited is the drawing of any money from the state treasury for the benefit of any religious school. If the stated reading of the Bible, in the school, as a text-book, is not only, in a limited sense, worship, but also instruction, as it manifestly is, then there is no escape from the conclusion that it is religious instruction; and hence the money so drawn from the state treasury was for the benefit of a religious school, within the meaning of this clause of the constitution.

The constitutions of Massachusetts, New Hampshire, and some other states differ so widely from ours as to make the adjudications in those states almost wholly inapplicable to the question here presented. It is conceded that no decision has been found, under constitutional provisions like ours, squarely sustaining the ruling of the learned trial court. Some things have been said in some of the cases cited, arising under somewhat similar constitutional provisions, that may seem to support it. Among these are *Donahoe v. Richards*, 38 Me. 379; 61 Am. Dec. 256; *Ferriter v. Tyler*, 48 Vt. 444; *Moore v. Monroe*, 64 Iowa, 367; 52 Am. Rep. 444; *Millard v. Board*, 121 Ill. 297. The Maine case, largely involving other considerations, is based in part upon decisions under constitutions

widely differing from ours, and was decided under a constitution containing none of the provisions upon which especial stress is here laid. The same is partially true of the Vermont case. The same is true, in a limited sense, of the Iowa and Illinois cases, and in neither of which is any adjudication cited. The following cases seem to be in harmony with the conclusions we have reached: *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373; *Board etc. v. Minor*, 23 Ohio St. 211; *State ex rel. Stallard v. White*, 82 Ind. 278; 42 Am. Rep. 496; *Spencer v. Joint School Dist.*, 15 Kan. 259; 22 Am. Rep. 268; *Dorton v. Hearn*, 67 Mo. 301; *Scofield v. Eighth School Dist.*, 27 Conn. 499; and *Weir v. Day*, 35 Ohio St. 143. They are, moreover, in harmony with prior decisions of this court: *Morrow v. Wood*, 35 Wis. 59; *School Dist. v. Arnold*, 21 Wis. 657. In the Nevada case, the decision was adverse to the use of the Catholic Bible. We deem it unnecessary to enter upon an extended analysis of the numerous adjudications cited, since the constitutional provisions here involved rest upon us with an imperative command.

The unanimous result of our deliberations is as directed by Mr. Justice Lyon.

ORTON, J. I most fully and cordially concur in the decision, and in the opinions of justices Lyon and Cassoday in this case. It is not needful that any other opinion should be written, but I thought it proper to state briefly some of the reasons which have induced such concurrence in the decision.

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship; . . . nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship": Const., art. 1, sec. 18.

"No religious test shall ever be required as a qualification for any office of public trust under the state, and no person shall be rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion": Const., art. 1, sec. 19.

The interest of the school fund, "and all other revenues derived from the school lands, shall be exclusively applied," etc., "to the support and maintenance of common schools, in each school district," etc.: Const., art. 10, sec. 2, subd. 1.

"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free, and without charge for tuition, to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein": Const., art. 10, sec. 3.

"Each town and city shall be required to raise by tax annually, for the support of common schools therein, a sum not less," etc.: Const., art. 10, sec. 4.

"Provision shall be made by law for the distribution of the income of the school fund among the several towns and cities of the state for the support of common schools therein," etc.: Const., art. 10, sec. 5.

These provisions of the constitution are cited together to show how completely this state, as a civil government, and all its civil institutions, are divorced from all possible connection or alliance with any and all religions, religious worship, religious establishments, or modes of worship, and with everything of a religious character or appertaining to religion; and to show how completely all are protected in their religion and rights of conscience, and that no one shall ever be taxed or compelled to support any religion or place of worship, or to attend upon the same, and more especially to show that our common schools, as one of the institutions of the state, created by the constitution, stand, in all these respects, like any other institution of the state, completely excluded from all possible connection or alliance with religion or religious worship, or with anything of a religious character, and guarded by the constitutional prohibition that "no sectarian instruction shall be allowed therein." They show also that the common schools are free to all alike, to all nationalities, to all sects of religion, to all ranks of society, and to all complexions. For these equal privileges and rights of instruction in them, all are taxed equally and proportionately. The constitutional name, "common schools," expresses their equality and universal patronage and support. Common schools are not common as being low in character or grade, but common to all alike, to everybody, and to all sects or denominations of religion, but without bringing religion into them. The common schools, like all the other institutions of the state, are protected by the constitution from all "control or interference with the rights of conscience," and from all preferences given by law to any religious establishments or modes of worship. As the state

can have nothing to do with religion except to protect every one in the enjoyment of his own, so the common schools can have nothing to do with religion in any respect whatever. They are as completely secular as any of the other institutions of the state, in which all the people alike have equal rights and privileges. The people cannot be taxed for religion in schools more than anywhere else. Religious instruction in the common schools is as clearly prohibited by these general clauses of the constitution as religious instruction or worship in any other department of state supported by the revenues derived from taxation.

The clause that "no sectarian instruction shall be allowed therein" was inserted *ex industria* to exclude everything pertaining to religion. They are called by those who wish to have not only religion, but their own religion, taught therein, "Godless schools." They are Godless, and the educational department of the government is Godless, in the same sense that the executive, legislative, and administrative departments are Godless. So long as our constitution remains as it is, no one's religion can be taught in our common schools. By religion I mean religion as a system; not religion in the sense of natural law. Religion in the latter sense is the source of all law and government, justice and truth. Religion as a system of belief cannot be taught without offense to those who have their own peculiar views of religion, no more than it can be without offense to the different sects of religion. How can religion, in this sense, be taught in the common schools without taxing the people for or on account of it? The only object, purpose, or use for taxation by law in this state must be exclusively secular. There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution, and war, and all evil in the state, as religion. Let it once enter into our civil affairs, our government would soon be destroyed. Let it once enter our common schools, they would be destroyed. Those who made our constitution saw this, and used the most apt and comprehensive language in it to prevent such a catastrophe.

It is said, if reading the Protestant version of the Bible in school is offensive to the parents of some of the scholars, and antagonistic to their own religious views, their children can retire. They ought not to be compelled to go out of the school for such a reason for one moment. The suggestion itself concedes the whole argument. That version of the Bible is hos-

tile to the belief of many who are taxed to support the common schools, and who have equal rights and privileges in them. It is a source of religious and sectarian strife. That is enough. It violates the letter and spirit of the constitution.

No state constitution ever existed that so completely excludes and precludes the possibility of religious strife in the civil affairs of the state, and yet so fully protects all alike in the enjoyment of their own religion. All sects and denominations may teach the people their own doctrines in all proper places. Our constitution protects all, and favors none. But they must keep out of the common schools and civil affairs. It requires but little argument to prove that the Protestant version of the Bible, or any other version of the Bible, is the source of religious strife and opposition, and opposed to the religious belief of many of our people. It is a sectarian book. The Protestants were a very small sect in religion at one time, and they are a sect yet, to the great Catholic Church, against whose usages they protested, and so is their version of the Bible sectarian, as against the Catholic version of it.

The common school is one of the most indispensable, useful, and valuable civil institutions this state has. It is democratic, and free to all alike, in perfect equality, where all the children of our people stand on a common platform and may enjoy the benefits of an equal and common education. An enemy to our common schools is an enemy to our state government. It is the same hostility that would cause any religious denomination that had acquired the ascendancy over all others, to remodel our constitution and change our government and all of its institutions so as to make them favorable only to itself, and exclude all others from their benefits and protection. In such an event, religious and sectarian instruction will be given in all schools. Religion needs no support from the state. It is stronger and much purer without it.

This case is important and timely. It brings before the courts a case of the plausible, insidious, and apparently innocent entrance of religion into our civil affairs, and of an assault upon the most valuable provisions of the constitution. Those provisions should be pondered and heeded by all of our people, of all nationalities, and of all denominations of religion, who desire the perpetuity and value the blessings of our free government. That such is their meaning and interpretation no one can doubt, and it requires no citation of authorities to show. It is religion and sectarian instruction that

are excluded by them. Morality and good conduct may be inculcated in the common schools, and should be. The connection of church and state corrupts religion, and makes the state despotic.

SCHOOLS — BIBLE-READING IN COMMON SCHOOLS. — The requirement that the Bible shall be used in the public schools merely as a reading-book is not an interference with a religious belief, and a violation of the spirit or letter of the Maine constitution: *Donahoe v. Richards*, 38 Me. 379; 61 Am. Dec. 256. Compare *Board of Education v. Minor*, 23 Ohio St. 211; 13 Am. Rep. 233. A statute providing that the Bible shall not be excluded from the public schools, but that no pupil shall be required to read it contrary to the wishes of his parent or guardian, is constitutional: *Moore v. Monroe*, 64 Iowa, 367; 52 Am. Rep. 444.

HOTCHKISS v. PHENIX INSURANCE COMPANY.

[76 WISCONSIN, 259.]

INSURANCE — POWER OF AGENT TO BIND COMPANY AS TO CONSTRUCTION OF POLICY. — Where a foreign insurance company, through its local agent, insures a dwelling-house and the personal property therein, under a policy providing that the house shall "be occupied by the assured or tenant," and that it shall become void if the house becomes "vacant or unoccupied," the company is bound by a statement made by the agent to the assured, at the time that the tenant ceased to occupy the insured premises, that the insurance would hold good for thirty days thereafter, and that the house would be considered as occupied while the personal property remained therein, and this, notwithstanding the policy provides that the agent has no authority to change any of its conditions or restrictions by parol.

Charles W. Felker, for the appellant.

Gabe Bouck, for the respondent.

LYON, J. The testimony tends to show that immediately after the tenant vacated the insured house the plaintiff went to see the agent of the defendant company at Omro, where the insured property was situated, informed him that the tenant had so removed, and asked him if her insurance was good, or if it needed any change, what she should do, and that the agent replied that her insurance was good just as it was, and agreed to carry it in that way for thirty days. Also, the question having been suggested to the agent whether the house would be considered occupied while the plaintiff's goods remained in it, he said it would, and there was no need of a vacancy permit to save the insurance while it was occupied in that way. This conversation occurred with the agent who

issued the policy, and less than thirty days before the insured property was burned. The above testimony was controverted by other testimony on behalf of the defendant.

The court instructed the jury that if they found the defendant's agent did tell the plaintiff, in substance, that the policy would hold good for thirty days although the premises were vacant, the plaintiff was entitled to recover. By finding for the plaintiff, the jury necessarily found the existence of the above facts. As a matter of course, it was competent for the jury to give credit to the testimony on the part of the plaintiff as to what occurred between her and the agent, and to reject the testimony on behalf of the defendant giving a different version of what the agent said on the occasion.

There is no claim here that the agent waived any condition of the policy, but only that he construed certain words contained in it in a certain way. The term "vacant or unoccupied" has no definite signification applicable alike to all cases. If it had, the plaintiff would be bound by such signification. Under certain circumstances, premises may be vacant or unoccupied; when, under other circumstances, premises in like situation may not be so, within the meaning of that term in insurance policies. Thus if one insures his dwelling-house, described in the policy as occupied by himself as his residence, and moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insure it as a tenement-house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house should be considered vacant, and the policy forfeited or suspended (according to its terms), immediately upon the tenant's leaving it. This distinction is made in some of the cases, — in *Lockwood v. Middlesex M. Ass. Co.*, 47 Conn. 553, 561; *Whitney v. Black River Ins. Co.*, 9 Hun, 39; 1 Wood on Insurance, sec. 91, pp. 208-210, and cases cited.

In this case, the insured house was "to be occupied by the assured or tenant as a dwelling." It was in fact occupied by a tenant when the policy was issued, of which the company had notice. It being doubtful what the term "vacant or unoccupied" means in such a case, and the policy in suit failing

to define it, the plaintiff had the right to know whether the insurance company regarded her house as vacant or unoccupied immediately upon her tenant's leaving it, to the end that, if the company did so regard it, she might take the necessary steps to keep good the insurance. This being a foreign insurance company, and presumably having no general officer in this state, there was no one but the agent of the company at Omro to whom she could conveniently and directly apply for the desired information. She promptly applied to him, and he assured her (as the jury must have found) that, notwithstanding the removal of the tenant, her policy, just as it was, would remain valid for thirty days; that is to say, he assured her, in substance and legal effect, that the removal of the tenant did not render the premises "vacant and unoccupied," within the meaning of that term in the policy as understood by the company. We think she applied to the right person for the desired information, and that the company is bound by the construction which, in its behalf, the agent put upon the policy.

The policy contained a stipulation that the agent of the company had no authority to change any of its conditions or restrictions by parol. But it is obvious that this stipulation is not involved in the determination of this case, for the agent did not assume to change any such condition or restriction.

The judgment of the circuit court is affirmed.

FIRE INSURANCE — "VACANT AND UNOCCUPIED." — For the signification of the words "vacant and unoccupied," when used in policies of insurance, see *Moore v. Phoenix Ins. Co.*, 62 N. H. 240; 13 Am. St. Rep. 556, and note; *Moore v. Phoenix Ins. Co.*, 64 N. H. 140; 10 Am. St. Rep. 334, and note 390-396.

MOLETOR v. SINNEN.

[76 WISCONSIN, 308.]

EXTRADITION — ARREST ON CIVIL PROCESS. — Where a non-resident has been brought within the jurisdiction of a court upon a requisition to answer to a criminal charge as a fugitive from justice, and has been tried for or discharged as to the crime charged against him, he is not subject to arrest on civil process, until a reasonable time and opportunity have been given him to return to the state whence he was taken.

Simon Gillen and D. T. Phalen, for the appellant.

Seaman and Williams, for the respondent.

COLE, C. J. Did the circuit court properly set aside the service of the summons and complaint in this action, and vacate the order of arrest therein? The defendant was brought into this state upon a requisition upon the governor of Illinois, having been charged with the crime of seducing the plaintiff under a promise of marriage, and alleging that he was a fugitive from justice. Upon an examination before a magistrate, he was bound over for trial. At the April term of the circuit court of Sheboygan County, 1889, an information was filed in that court charging the defendant with having committed the crime of seduction. At the October term of that court the defendant was duly arraigned, and a plea in abatement was interposed, setting up the statute of limitations as a defense to the action. This plea was sustained by the court, and the defendant was discharged from custody. Within ten minutes after his discharge, and before he had departed from the court-room, the deputy sheriff made service of summons and complaint and order of arrest upon him, at the suit of the plaintiff, for a breach of promise.

It appears that the defendant, at the time of the alleged seduction, was a resident of Sheboygan County. He left the state in January, 1888, and remained outside the state, except that he returned in the night-time in the same month, and transacted some business, and immediately left. He was brought back on a requisition as a defendant in a criminal action, and as a fugitive from justice. It is said by the counsel for appellant that the affidavit of the defendant upon which the order of the court setting aside the service and order of arrest is based is insufficient, because it fails to show any fraud or abuse of the process of the court by the appellant, or by any person acting for her, in the procurement of the return of the defendant on the criminal prosecution, nor does it show that the defendant was, at the time he so returned on the requisition, a *bona fide* citizen of Illinois. But it appears, from the affidavit of the plaintiff which was used to obtain the order of arrest, that the defendant was not a resident of this state, but resided in the city of Chicago, and that he was about to return to that state; and while the promise of marriage was made, and the alleged seduction was accomplished, in 1887, it does not appear that the plaintiff had anything to do in procuring the defendant's return on the requisition of the governor, nor does it appear that there was any fraud used on the part of any one to get the defendant within the state.

In that respect the case is distinguishable from *Townsend v. Smith*, 47 Wis. 623, 32 Am. Rep. 793, and cases where jurisdiction is obtained by fraudulent means.

It is assumed, in this case, as a fact, that the defendant had committed the crime of seduction, as alleged, and had withdrawn himself from the state to avoid a prosecution therefor, so as to be a fugitive from justice in a legal sense. Still, having been forcibly brought to the state on a requisition, and the court having exhausted its jurisdiction over him in respect to the crime with which he was charged, could he properly be arrested in a civil action until a reasonable time and opportunity had been given him, after his discharge, to return to the state from which he had been forcibly taken? This is the question involved in the appeal; and we think sound principle requires that where a person has been brought within the jurisdiction of a court upon a requisition as a fugitive from justice, and has been tried for or discharged as to the offense charged against him, he ought not to be subject to arrest on a civil process until a reasonable time and opportunity has been given him to return to the state from which he was taken. In the courts of the United States the weight of judicial opinion is in favor of the proposition that where a party in good faith is brought within the jurisdiction of a state, or detained therein, being a non-resident, either as a party to a suit or as a witness in another suit, he is not subject to service: *Small v. Montgomery*, 23 Fed. Rep. 707; *Juneau Bank v. McSpedan*, 5 Biss. 64; *United States v. Bridgman*, 9 Biss. 221; *Blair v. Turtle*, 1 McCrary, 372; 5 Fed. Rep. 394; *Atchison v. Morris*, 11 Fed. Rep. 582. Many of the state courts hold the same rule: *Compton v. Wilder*, 40 Ohio St. 130; *People ex rel. Watson v. Judge*, 40 Mich. 730; *Cannon's Case*, 47 Mich. 482; *Baldwin v. Branch Circuit Judge*, 48 Mich. 525; *Jacobson v. Hosmer*, 76 Mich. 234; *Sherman v. Gundlach*, 37 Minn. 118; *Chubbuck v. Cleveland*, 37 Minn. 466; 5 Am. St. Rep. 864; *Palmer v. Rowan*, 21 Neb. 452; 59 Am. Rep. 844; *Wanzer v. Bright*, 52 Ill. 35; *Williams v. Reed*, 29 N. J. L. 385; *Hill v. Goodrich*, 32 Conn. 588. The last three cases go upon the same ground as *Townsend v. Smith*, 47 Wis. 623; 32 Am. Rep. 793.

The reason for the rule that a person is exempt from arrest under the circumstances disclosed in this case is, that sound public policy requires that a person shall be privileged from arrest while going to or from court in all judicial proceedings. The privilege should exist to subserve great public interests

and the due administration of justice. Moreover, as was said by Campbell, J., in *Cannon's Case*, 47 Mich. 482, "it is very well known that the perversion of extradition proceedings has on more than one occasion led to difficulties between nations, and to refusals by state executives to deliver up persons charged with crime, whose arrest was supposed to be desired for sinister purposes." The temptation is certainly strong to make such requisitions subservient to private interests; and they are often resorted to to enforce a collection of private debts, or to remove a citizen from his home into a foreign jurisdiction in order to get service on him in a civil action. For the most cogent reasons, therefore, we think courts of justice are bound to see that no improper use be made of such proceedings, which would look like a violation of good faith and a perversion of measures which had to be resorted to in order to bring the party accused within their jurisdiction.

We do not deem it necessary to comment in detail upon all the cases cited. We will observe, however, that in cases of extradition by a foreign government, under a treaty, the supreme court of the United States holds that a person who has been brought within the jurisdiction of a court by virtue of proceedings under an extradition treaty could only be tried for one of the offenses described in said treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity had been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings: *United States v. Rauscher*, 119 U. S. 407.

A distinction is made in some of the authorities between civil and criminal cases. In criminal cases, some courts hold that even a forcible seizure in another country, and the transfer by violence or fraud to this country, is no sufficient reason why the party should not answer when brought within the jurisdiction of a court which has the right to try him for such an offense: See *Ker v. Illinois*, 119 U. S. 436; *Mahon v. Justice*, 127 U. S. 700. The offense having been committed in the state to which the party is brought, he may be there tried for it; and neither comity to a sister state, nor any just appreciation of the rights of a citizen, entitle him to be released. He may be held to answer for the crime he has committed. This question is fully considered in *State ex rel. Brown v. Stewart*, 60 Wis. 587; 50 Am. Rep. 388. But it is obvious there is no

fair analogy between civil and criminal cases in this respect, and a different rule applies.

It follows from these views that the order of the circuit court must be affirmed.

EXTRADITION. — Where parties procure extradition process and cause a fugitive to be brought into another state on a criminal charge, they have no right to institute a civil suit against the fugitive until he has had a reasonable time to return: Note to *Matter of Fetter*, 57 Am. Dec. 400; *contra*, *Adriance v. Lagrave*, 59 N. Y. 110; 17 Am. Rep. 317. Compare *State v. Hall*, 40 Kan. 338, 10 Am. St. Rep. 200, and note 207-210, as to the right to try persons for other offenses than that for which they have been extradited.

SPALDING v. BERNHARD.

[76 WISCONSIN, 368.]

LEGAL HOLIDAYS, VALIDITY OF JUDICIAL ACTS ON. — The approval of the bond of an assignee for the benefit of creditors, by a court commissioner, on a legal holiday, assuming it to be the exercise of a judicial act, is nevertheless valid within the meaning of a statute which prohibits any court from being open or transacting any business on legal holidays.

LEGAL HOLIDAYS ARE NON-JUDICIAL DAYS ONLY WHEN MADE SO BY STATUTE, and then only so far as they are expressly made so. In all other cases, the doing of judicial acts on such days is valid.

Lennon and Sleight, for the appellant.

Cole and O'Keefe, and Kate H. Pier, for the respondent.

CASSODAY, J. May 29, 1888, C. H. Hammersley & Co., made a general assignment to the defendant, Bernhard, for the benefit of their creditors. The assignee made and executed his bond, and the same was approved May 30, 1888. June 2, 1888, this action was commenced by the plaintiff, a corporation of the state of Illinois, against the assignors, and the garnishee papers were served on that day upon the assignee. July 27, 1888, judgment was entered in the principal action against the assignors.

On the issues between the plaintiff and the garnishee a trial was had by and before the court without a jury, and the court found as matters of fact, in effect, that such assignment was made May 29, 1888, and acknowledged on that day before a notary public; that in the execution of said assignment and the filing of the same and the inventory, the statutes were complied with, except that the assignee's bond was by him and his sureties executed, and such sureties therein justified

before a court commissioner on May 30, 1888; that the affidavit as to the nominal value of the assets was made before said commissioner on that day, on the reverse side of the bond; that upon said bond was indorsed, in writing, an approval of the same, both as to the form and the sufficiency of the sureties, by said commissioner, May 30, 1888, and that the same was filed on that day with the clerk of the circuit court by said commissioner; that the consent, in writing, of said assignee to take upon himself the duties of such trust, was dated May 30, 1888; that the certificate of said commissioner to the copy of the assignment was made on that day; that such bond and copy of assignment, with indorsements and certificates, were filed with the clerk of the court May 30, 1888; that by virtue of said assignment the assignee took possession of the assignor's stock May 31, 1888; that said stock was inventoried at the nominal value thereof, and such inventory filed with the clerk of said court June 5, 1888; that no other bond was ever executed or relied upon except the one stated; that this action was commenced and judgment against the principal defendant taken as stated.

And as conclusions of law the court found, in effect, that said assignment was void upon its face; that said assignee could not hold the property of the firm thereunder; that the plaintiff was entitled to judgment against the garnishee, and the same was ordered accordingly. From the judgment entered thereon the garnishee appeals.

The only question involved in this appeal is, whether the assignment was void by reason of the execution of the bond, the approval thereof by the commissioner, and the filing of the same, with a copy of the assignment, as stated, on May 30, 1888. The portion of the statute which here requires special consideration reads: "No court shall be opened or transact any business . . . on any legal holiday, unless it be for the purpose of instructing or discharging a jury, or of receiving a verdict and rendering a judgment thereon": R. S., sec. 2576, as amended by Laws of 1879, c. 194, sec. 2, subd. 19, and Laws of 1885, c. 142. The thirtieth day of May, 1888, was a legal holiday: R. S., sec. 2577. Of course there could be no valid assignment against the plaintiff as a creditor of the assignors, without the giving and filing of the requisite bond, duly approved by the court commissioner taking the same: R. S., sec. 1694. It is conceded that this section of the statute was in every respect complied with, unless the

commissioner was prohibited from approving the bond, or doing the other acts named in the foregoing statement, by the provision of the statute above quoted.

The argument is, that "the circuit court, or the judge thereof in vacation," had "supervision of the proceedings in all voluntary assignments made under the provisions of "chapter 80, Revised Statutes, and could "make all necessary orders for the execution of the same"; and that the court commissioner had authority to "exercise within his county the powers of a circuit judge at chambers, in any civil action pending" therein; and hence that his approval of the bond was a judicial act prohibited by the statutory provision quoted. The "supervision of the proceedings" in such voluntary assignments, and the making of "orders for the execution of the same," manifestly presuppose a completed assignment, with the requisite bond filed as required by the statute. Assuming that the approval of the bond by the commissioner was a judicial act, still it would be an abuse of language to say that it was the transaction of any business by a court. The statute simply prohibits any court from being open or transacting any business on any legal holiday, except as stated *supra*. The action of the commissioner in question was not the transaction of any business by any court, much less an act of the court in open court. To extend the statute beyond its language, plainly expressed, and apply it to the action of a mere court commissioner, or even of a judge at chambers, would be an attempt at judicial legislation entirely unauthorized.

There are numerous cases in the books holding, in effect, that no act will be held illegal merely by reason of being performed on such legal holiday, unless forbidden by statute. In New Jersey, they have a statute prohibiting the holding of court or the exacting of compulsory labor on legal holidays. The language of their court in a late case is so apposite to the case at bar that we quote: "The history of the common law and of legislation with respect to Sunday clearly indicates that it owes its exceptional position to a general sense of its sacred character as a holy day. To no other day — although many account other days holy — has a like distinction been accorded. When we compare the course of the common law and legislation respecting Sunday with the statute now before us, a different treatment is observable. Although some of the days named are accounted holy by many, while others are national anniversaries, or days when public

duties are enjoined on citizens, yet there has been enacted no prohibition against the pursuit of any business or pleasure. There is no express prohibition against the service of the process of the courts. . . . The statutory declaration that these days shall be legal holidays does not indicate an intent to assimilate their *status* to that of Sunday. 'Holiday,' in its present conventional meaning, is scarcely applicable to Sunday: *Phillips v. Innes*, 4 Clark & F. 234. It is applicable to all, and has long been applied to some of the days named. When the statute declares them to be legal holidays, it does not permit a reference to the legal *status* of Sunday to discover its meaning; for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done. The plain intent of the statute, therefore, is to free all persons, upon the days named, from compulsory labor and from compulsory attendance upon courts as officers, suitors, or witnesses. Its true interpretation will limit the prohibition, with respect to the courts, to such actual sessions thereof as would require such attendance": *Glenn v. Eddy*, 51 N. J. L. 255; 14 Am. St. Rep. 684. Accordingly, it was held in that case that a summons might be legally issued, tested, and served on such legal holiday. To the same effect is *Smith v. Ihling*, 47 Mich. 614.

In Oregon, it has recently been held that although the service of process issued from a court upon a legal holiday was irregular, and might be set aside, yet that the service of notice of a contested election on that day was valid: *Whitney v. Blackburn*, 17 Or. 564; 11 Am. St. Rep. 857. In a case arising in this state under our statute, Judge Drummond held that, "in the absence of prohibitory legislation by the state, the docketing of a transcript of judgment on a holiday is not void, but will confer a valid lien upon the real estate of the debtor in the county where it is filed": *In re Worthington*, 16 Nat. Bank. Reg. 54. In that case, the learned judge distinguishes *Lampe v. Manning*, 38 Wis. 673, in which the cause was tried and the judgment rendered on a legal holiday, and said: "At common law, Sunday was deemed a non-juridical day, during which no courts could transact any business or render any decree. Of course, at common law, some of the days which, under our practice, are deemed non-juridical were unknown as such; and when they are so declared, the inference would

be that the prohibition extends no further than is named in the statute." This is in harmony with the language quoted from the New Jersey court, and there is nothing in our decisions in conflict with it. On the contrary, it has been held that our statute "does not prohibit a justice of the peace from issuing a summons on such a holiday": *Weil v. Geier*, 61 Wis. 414; nor "render inadmissible in evidence a deposition taken in another state on a day made a legal holiday in this state": *Green v. Walker*, 73 Wis. 548.

We must hold that the approval of the bond in question by the court commissioner, assuming it to have been a judicial act, was nevertheless valid, and hence that the assignment was improperly held void for that reason.

The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

HOLIDAYS. — A legal holiday is *dies non juridicus* only when expressly made so by statute, and even then only as to such acts as are specifically prohibited from being done on that day: *Hamer v. Sears*, 81 Ga. 288; *Slater v. Schack*, 41 Minn. 269; *Pfister v. State*, 84 Ala. 432; *Glenn v. Eddy*, 51 N. J. L. 255; 14 Am. St. Rep. 634.

DUFFIES v. DUFFIES.

[76 WISCONSIN, 374.]

MARRIED WOMEN — WIFE'S RIGHT OF ACTION FOR LOSS OF HUSBAND'S SOCIETY AND SUPPORT. — A wife cannot, either at common law or under the statutes of Wisconsin, maintain an action against one who entices away her husband.

Van Dyke and Van Dyke, for the appellant.

Williams, Friend, and Bright, for the respondent.

ORTON, J. This action is brought by the plaintiff, as the wife of one Frank W. Duffies, against the defendant, the mother of said Frank, to recover damages by reason of the defendant having wrongfully induced, persuaded, and caused the said Frank W. Duffies to refuse further to live and cohabit with the plaintiff and to support and maintain her and to support and maintain their child, and maliciously enticed him away from her, intending thereby to deprive her of his society and support, maintenance, aid, and assistance. The action was tried, and the plaintiff recovered, by the verdict of the jury, two thousand dollars, of which the plaintiff remitted one

thousand dollars, and judgment was rendered for the residue thereof. Errors are assigned for admitting irrelevant testimony, refusing to submit certain questions to the jury and to give certain instructions, and for denying motions for nonsuit and for a new trial; but they will not be considered any further than some of them may involve the question whether the action itself will lie.

The learned counsel of the appellant, before the trial was commenced, objected to the introduction of any evidence under the complaint, on the ground that it stated no cause of action, which objection was overruled. On this demurrer, *ore tenus*, the learned counsel contended that this action would not lie at common law, and that there is no statute allowing it. From the examination of the authorities we have been able to make, and considering the reason thereof, we have concluded that such contention is correct, and that the action cannot be maintained.

The learned counsel of the respondent contends that the action lies, — 1. At the common law; and 2. By the terms and liberal interpretation of our statutes; and 3. By analogy to similar cases. The learned counsel does not contend that any such action was ever maintained at the common law, but that by the principles of the common law, and in analogy to similar actions at the common law, the right of action existed, and was not maintainable only on account of the wife's disability to bring the action. But the wife was not only unable to bring the action to recover damages for the loss of her husband's society, but the damages themselves were the property of the husband, the same as in case of personal injury, or for defamation, even before marriage: *Gibson v. Gibson*, 43 Wis. 23; 28 Am. Rep. 527; *Barnes v. Martin*, 15 Wis. 240; 82 Am. Dec. 670. How can she be said to have had a right of action to recover damages which she could neither own nor enjoy? More properly, the right of action was in the husband, in the interest or on account of his wife. The common law could not recognize a right of action in the wife to sue for the loss of her husband's society, without involving the absurdity that the husband might also sue for such a cause. The wife having no right of property, at common law, in any damages recovered on her account for any cause, neither could she have any right of action to recover them. This may have been grossly wrong, but such was the theory of the common law, and, to make it consistent, the wife had no such right of ac-

tion. The wife was not only inferior to the husband, but she had no personal identity separate from her husband. It is not proper to say that the common law was inconsistent in denying to the wife the right to bring such an action, and at the same time allowing the husband to sue for the loss of the society of his wife. Her disability in this respect was consistent with all of her other disabilities.

When the learned counsel cites the case of *Winsmore v. Greenback*, Willes, 581, decided in the nineteenth year of George III., in which the husband sued for enticing away his wife, *per quod amisit* the comfort and society of his wife, as furnishing the same reason for the wife bringing such an action, he ignores all these common-law disabilities of the wife, which are consistent with each other. Chief Justice Willes admitted that there was no precedent for such an action but, as the action on the case had been invented for similar cases, he claimed that this was only another case with new facts, and as there were "injury and damage," and the violation of a right, and the action ought to lie, it would lie within the reason of other cases. And so the learned counsel argues from *Philp v. Squire*, Peake, 82, in the thirty-first year of George III., in which Lord Kenyon held that the action by the husband was not for the loss of the services of the wife, but of her society.

In *Pasley v. Freeman*, 3 Term Rep. 51, the action was for making a false affirmation with intent to defraud. Lord Kenyon held that the action would lie, although a new case, because there was *damnum cum injuria*. In *Ashby v. White*, 2 Ld. Raym. 938, decided in 1701, the action was against an officer for refusing to receive the plaintiff's vote. It was a case *primæ impressionis*, but Chief Justice Holt, against the other judges, held that the action would lie at common law, on the ground that where there is a wrong there should be a remedy. In *Chapman v. Pickersgill*, 2 Wils. 145, the action was for falsely and maliciously suing out a bankrupt commission, and it was held that the action would lie at common law on the same ground. In *Lumley v. Gye*, 2 El. & B. 216, the action was for enticing away a singer employed to sing in a theater and in *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, for enticing away a common laborer employed by the plaintiff.

These are all new cases, predicated upon the same general principles of the common law. The argument is, if these actions can be sustained, and the action of the husband for the

loss of his wife's *consortium*, why may not an action by or on behalf of the wife, for the loss of her husband's society, support, and protection be maintained on the same principles? The reason is obvious, and suggested above. The wife had no property in the *consortium* of her husband, that is lost, nor any right to it that has been violated at common law. If the same able judges who were free to invent actions and to sustain new cases in an old action, and were quick to see the justice and humanity of all cases, could have found a right of action of the wife in such a case, we may believe that old forms and fictions would not have stood in the way. Her relative position and conditions as a wife, at common law, precluded the recognition of any such right of action. Under the civil law, the husband and wife were distinct persons. The wife had a separate estate, the right to contract debts, and to bring actions for injuries. Her position was so nearly equal to that of her husband that her right to his society was recognized, and she had a remedy for its loss. But that remedy was confined to the ecclesiastical courts, and consisted only in having her husband returned to her: 1 Bla. Com. 444. The wife had a right of action for defamation, by the civil law, but it was denied her in the common-law courts, because she would then have two actions, or a double remedy: *Palmer v. Thorpe*, 4 Coke, 19; *Byron v. Emes*, 12 Mod. 106; 2 Salk. 694. Another reason was, that an action for defamation would not lie without special damages, and the wife could have no special damages.

In looking into the books of the common law we can find no such action or right of action of the wife, and they are both denied on principle as well as want of precedent. In the genial light of modern times, the true situation and position of the wife, in the marriage relation, are seen more clearly than formerly, and the place assigned her by the law and by common consent is much higher, and more suitable to her intrinsic character, ability, and worth. She is placed on a nearer equality with her husband in her rights of person, property, and character. Under the just and genial laws of married women, she has resumed her position of a *feme sole*, as nearly as is compatible with natural law. It is not, therefore, surprising that so great and gallant, learned and humane, a judge and chancellor as Lord Campbell should hold, in *Lynch v. Knight*, 9 H. L. Cas. 577, that the wife had the same right to the *consortium* of her husband that he had to hers, and might

allege special damage for its loss, caused by defamation of her character. The lord chancellor said that it was a case of first impression, and rested his opinion upon the great changes that had taken place in the position and relations of the wife under modern legislation. The opinion is by no means positive, and placed the right on the condition that it might be shown that the wife's "loss and injury" concurred. But the opinion is *obiter* in that case, and off-hand, and can hardly be accepted as authority. But the remedy of the wife was of no use or benefit to her, for she had to join her husband in the suit, and the damages recovered belonged exclusively to him. The plaintiff obtained judgment in queen's bench in Ireland. It was affirmed in exchequer by a divided court, and reversed in the house of lords, but on another question. It is, however, a decision that no such case had ever been sustained at common law.

In *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, it was held that the action would not lie at common law, and it was only allowed in Ohio by the statute that gave the wife a right of action for all violations of or injuries to the wife's "personal rights." Judge Cooley said he could see no reason why such an action might not exist, when the statute allowed her to sue for personal wrongs: Cooley on Torts, 228. "Personal rights" are not rights of person. The latter are physical, and the former are relative and general, and embrace all the rights any person may have and all the wrongs he may suffer. The court held correctly that the right to the society of her husband was a personal right, under the statute. It was so held also in *Clark v. Harlan*, 1 Cin. Rep. 418. It is said in the opinion that the wife had no such right at common law as a personal right, and therefore she could not sue, but she may by force of the statute. But it was held in *Mulford v. Clewell*, 21 Ohio St. 191, that, under the statute that allowed the wife to sue for "injury to her property or person," she could not bring this action for the *consortium* of her husband, nor at common law.

In many cases, as in *Ashby v. White*, 2 Ld. Raym. 938, it has been held that the action might be brought, because there should be "no wrong without a remedy," as Chief Justice Holt said in that case. But we must not forget that to entice away her husband was no wrong to the wife, and she had no right to his society, and the damages, if any, belonged to him at common law. In *Van Arnam v. Ayers*, 67 Barb. 544, it

was held that the action would not lie at common law, nor under the statute, "for injury to her person and character," or her separate property. In *Jaynes v. Jaynes*, 39 Hun, 40, it was held that the action would lie under the statute of "civil procedure," but not at common law. In *Breiman v. Paasch*, 7 Abb. N. C. 249, it was held that the action would lie, if not under the statute, under the authority of *Lynch v. Knight*, 9 H. L. Cas. 577, since the wife's disability to sue alone had been removed. In *Baker v. Baker*, 16 Abb. N. C. 293, the right is predicated upon the wife's separate property, and the right to sue for injury to her person and character. In *Logan v. Logan*, 77 Ind. 559, the action by the wife was for defamation, and she counted *per quod* for loss of the society of her husband. It was held that she might bring the action under the statute of "injury to her person or character," but it could not be extended for loss of the society of her husband. In *Calloway v. Laydon*, 47 Iowa, 456, 29 Am. Rep. 489, an action under the liquor law like ours in chapter 127, Laws of 1872, in which the wife might recover "for injury to her person, property, or means of support, and for all damages sustained, and for exemplary damages," it was held that she could not recover for the loss of her husband's society. And so in *Freese v. Tripp*, 70 Ill. 503, and in *Confrey v. Stark*, 73 Ill. 187, and *Mulford v. Clewell*, 21 Ohio St. 191.

The recent case of *Foot v. Card*, 58 Conn. 1, 18 Am. St. Rep. 258, is sustained by the authority of *Lynch v. Knight*, 9 H. L. Cas. 577, and on the ground that the wife is in a condition of perfect equality with her husband, and "her right is the same as his, in kind, degree, and value." It is said that even if the damages go to the husband, he would hold them as trustee for the wife. This case would be of greater authority if the expressions of the wife's absolute equality with her husband were less general, sweeping, and unlimited. The still more recent case of *Bennett v. Bennett*, 116 N. Y. 584, holds that the action will lie at common law, and cites *Lynch v. Knight*, 9 H. L. Cas. 577, and under the statutes which allow her to recover for "injury to her person or character," and give her separate property. It is held, in the leading opinion, that the wife can sue alone for all injuries to her person, and the damages recovered will belong to her.

It will be seen that there is very little conclusive authority on this question by the decisions of the courts in this country or in England. The doctrine may be said to be unsettled.

Those courts which hold that the action will lie at common law do so because the statute has placed the wife on an equality with the husband or removed her disabilities. This would seem to imply that the action would not lie at common law, but by statute. Other courts hold that the right of action existed at common law, and would therefore lie as soon as the statute removed the wife's disability to sue alone. The question may be said to be a new one in this court, although the effect of some of our decisions may have a direct bearing upon it. The case of *Peterson v. Knoble*, 35 Wis. 80, was an action under the liquor law, commonly called the Graham Law, to recover for injury to the "person, property, or means of support" of the wife. The husband was made drunk, and turned his wife out of doors. The question was raised whether damages for the injury to her feelings, and for the indignity, could be recovered in the action. The court cites *Mulford v. Clewell*, 21 Ohio St. 191, as holding that nothing could be recovered, except for actual violence, or physical injury to the person or health, not even for her disgrace or loss of society of her husband, and, while approving that case, holds that for injury to the feelings, and for the indignity, she may recover, because it is a part of the actual damages in the action, and connected with the injury to her person, and because "exemplary damages" may also be recovered under the statute. This limitation to the actual damages for the physical injury would seem to imply that the loss of her husband's society could not be recovered for under the statute. The cases in Ohio and Illinois, under the same law, hold that damages for the loss of the husband's society cannot be recovered, as we have seen. The case of *Dillon v. Linder*, 36 Wis. 344, was brought under the same statute: Laws of 1872, c. 127. While it was pending, and before trial, chapter 179, Laws of 1874, repealing the above chapter, was passed, and the question was, whether by such repeal the action was defeated or abated, or saved by section 33, chapter 119, of the Revised Statutes of 1858, now section 4974, Revised Statutes. It was held, Chief Justice Ryan writing the opinion, that the section referred to related only to "new forms of remedy for old rights," and that the statute created the cause of action itself, and that the repeal took away the right of action, and that was not saved by the statute, and was therefore gone. The important and pertinent effect of this decision is, that the statute created the cause of action or right of action to recover

damages by reason of any person causing, through drunkenness of the husband, any injury to the wife's "person, property, or means of support, and any damages sustained, and exemplary damages." Then it follows that such a cause of action or right of action did not exist at common law, but is purely statutory. If, then, such damages could not be recovered at common law, much less could a more remote and speculative class of damages, for the loss of the husband's society by such means, be recovered at common law, or without a statute creating such a cause of action or right of action. It follows also, as before said, that the right of action of the wife in such a case did not exist at common law. It was not a mere common-law disability to bring the action.

The only two statutes now in force in this state allowing the wife to bring an action alone, and to have the damages recovered her own separate property, are said chapter 179, Laws of 1874 (section 1560, Revised Statutes), which gives her an action against any person who causes, through the drunkenness of the husband, "injury to her person, property, or means of support," and chapter 99, Laws of 1881, which gives her an action for any "injury to her person or character." According to common reason and the decided weight of authority, neither of these statutes gives the wife any right of action for the *consortium* of her husband. The loss of her husband's society is not an injury to her person, property, means of support, or character, and such an action cannot be forced within the terms or spirit of the statutes, by the most strained and liberal construction. Such a right of action does not exist by law, nor can it be inferred from the ameliorated and changed conditions of the wife, and her equality with her husband, produced by modern legislation in her behalf. Whatever equality of rights with her husband she may have, it is not proper to say that "her right to the society of her husband is the same, in kind, degree, and value, as his right to her society."

There are natural and unchangeable conditions of husband and wife that make that right radically unequal and different. The wife is more domestic, and is supposed to have the personal care of the household, and her duties in the domestic economy require her to be more constantly at home, where the husband may nearly always expect to find her and enjoy her society. She is purer and better by nature than her husband, and more governed by principle and a sense of duty and

right, and she seldom violates her marriage obligations, or abandons her home, or denies to her husband the comforts and advantages of her society by any inducement or influence of others, without just cause. Actions against others for enticing her away from her home and her husband's society are not frequent. She is protected from such wrong, not only by her integrity of character, but by greater love for her family and the comforts and genial influences of home life. With the husband the case is different. He may not be his wife's superior in the sense of the common law, or in anything, and may be her inferior in many things, but he is charged with the duty of providing for, maintaining, and protecting his wife and family. He is engaged, for this purpose, in the business and various employments of the outside world, that must necessarily, more or less, deprive his wife of his society. The exigencies of even his legitimate business may keep him away from her and his home for months or years. He is exposed to the temptations, enticements, and allurements of the world, which easily withdraw him from her society, or cause him to desert or abandon her. Others may entice or induce him to do many things, for business or pleasure, which may deprive his wife of his society. The wife had reason to expect all these things when she entered the marriage relation, and her right of his society has all these conditions, and is not the same in "degree and value" as his right to hers. For these reasons, and many others, if actions by the husband for the loss of the society of his wife are not frequent, actions by the wife for the loss of his society would be numberless. This right of action in the wife would be the most fruitful source of litigation of any that can be thought of. The loss of his society need not be permanent, for a cause of action. For a longer or shorter time, if caused by improper inducements or enticements, the right would accrue. There would seem to be very good reason why this right of action should be denied. The justice and advantages of such an action are at least doubtful. For these reasons, this action cannot be sustained on the ground of the wife's equality in right, or of "a remedy for every wrong," or of the coincidence of "injury and damage," or of the constitutional right of a remedy for "injury to person, property, or character."

The right is, at least, so doubtful that the courts may well await a direct act of the legislature conferring it. There are questions of public policy and expediency involved that may

well be considered by the legislature. The court should have sustained the objection of the defendant to any evidence under the complaint, on the ground that it did not state a cause of action.

The judgment of the superior court is reversed, and the cause remanded, with direction to dismiss the complaint.

CASSODAY, J., dissented, and held that there was high authority for saying that at common law an action by a wife for damages could be maintained for the alienation and loss of the affection and society of her husband; citing *Lynch v. Knight*, 9 H. L. Cas. 577; *Bassett v. Bassett*, 20 Ill. App. 543; *Foot v. Card*, 58 Conn. 1; *Bennett v. Bennett*, 116 N. Y. 584; affirming *Bennett v. Bennett*, 41 Hun, 640; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13. This last case maintains that it is necessary for the husband to join in the action; and in Wisconsin the rule is established that in actions for tortious injury to the wife, prior to the recent enactment of a statute on the subject, it was necessary for the husband and wife to join in the action; *Gibson v. Gibson*, 43 Wis. 23; *Meese v. Fond du Lac*, 48 Wis. 323; *Shanahan v. Madison*, 57 Wis. 276. Chapter 99 of the Laws of 1881, however, gave to married women, as though they were sole, the right to maintain an action for any injury to their persons or characters, and took from their husbands all right to or control over such action, and all right to or interest in any judgment recovered therein; *Shanahan v. Madison*, 57 Wis. 276. Prior thereto, such action, if brought in the name of the wife alone, could be defeated by proving the marriage in abatement; *McLimans v. Lancaster*, 63 Wis. 596. In this case, it was decided that the defect of commencing the action in the name of the wife alone was cured by such statute, and the court, in so ruling, followed *Weldon v. Winslow*, L. R. 13 Q. B. Div. 786, where Brett, M. R., said: "For such a cause of action, no action could ever have been brought by the husband alone, without joining his wife as plaintiff. . . . The injury to the wife was the meritorious cause of action; and if she had died before the commencement of the action, the husband would not have been entitled to sue. If damages should be given, they would belong, in the first place, to the wife alone; and if they should not be reduced to possession by the husband, and he should die, the damages would be hers, and would not go to his executors." It has been frequently determined that compensatory damages include mental suffering, and that no distinction exists between other forms of mental suffering and that which consists in a wrong or insult arising from an act really or apparently dictated by a spirit of willful injustice, or by deliberate intention to vex, degrade, or insult; *Craker v. Chicago etc. R'y Co.*, 36 Wis. 658; *Grace v. Dempsey*, 75 Wis. 323, and cases cited. Within the rulings in the cases cited no reason is perceived why the present action is not maintainable, and especially if such right of action existed jointly in favor of the husband and wife, at common law, as indicated by the cases cited.

HUSBAND AND WIFE — WIFE'S RIGHT OF ACTION FOR LOSS OF HUSBAND'S SOCIETY. — In Connecticut, a wife may maintain an action against a woman who has alienated from her the affections and deprived her of the society of her husband; *Foot v. Card*, 58 Conn. 1; 18 Am. St. Rep. 258; and it has been so decided in New York, Illinois: Note to *Doe v. Roe*, 17 Am. St. Rep. 500; and Ohio: *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397. But *contra*, see *Doe v. Roe*, 82 Me. 503; 17 Am. St. Rep. 499. Compare note to *Shaddock v. Clifton*, 94 Am. Dec. 593, 594.

BELOW v. ROBBINS.

[76 WISCONSIN, 600.]

EXEMPTIONS — JUDGMENT FOR CONVERSION OF EXEMPT PROPERTY IS EX-EMPT. — A judgment against a sheriff for the wrongful conversion by him of property exempt from sale under execution is, together with costs, also exempt, and cannot be discharged by payment of the amount thereof to another sheriff, holding an execution against the exempt judgment debtor's property. A statute providing that "after the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of the debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid," does not include, and should not be applied to, a judgment for the value of exempt property.

Bloodgood, Bloodgood, and Kemper, for the appellant.

Lynch and Latta, for the respondent.

COLE, C. J. It is not denied that the judgment against the defendant in this case was for the wrongful conversion of property exempt from sale upon execution. In other words, it was for the conversion of a stock of goods, selected and kept by the plaintiff for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value. The statute expressly exempts that amount of stock: R. S., sec. 2982, subd. 8. The defendant, as sheriff, had wrongfully seized and sold the stock upon an execution issued on a prior judgment against the plaintiff, in favor of S. T. and F. E. Mock, judgment creditors. After the judgment for the conversion of the exempt property was rendered and docketed, the defendant therein attempted to discharge it by paying the amount thereof to the sheriff of Langlade County (taking a receipt for the same), who had in his hands an *alias* execution issued on the Mock judgment. This was done in pursuance of section 3028 of the Revised Statutes, which, it is claimed, authorizes such payment. Therefore the question presented is, Does that section of the statute authorize such a payment and discharge of this judgment for the conversion of exempt property?

The section reads: "After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid." We are clearly of the opinion that this provision was not intended to include, and should not be applied to, a judgment

for the value of exempt property. If such a judgment could be discharged by applying the amount on another judgment against the person claiming the exemption, the spirit and policy of the statute would be defeated in many cases. This court has uniformly held that the exemption laws must have a liberal construction, so as to secure their full benefit to the debtor. It would be useless to grant the privilege contained in these laws, if it could be defeated or rendered of no possible value by allowing the judgment for the conversion of exempt property thus to be satisfied. Unless the judgment itself is held exempt, or enjoys the privileged position which the property had which it represents, the debtor is not protected. This is very obvious. Public policy requires such a construction of the above provision that it will not impair in any degree the beneficent intent of the exemption law. In the language of Commissioner Leonard, when considering a kindred question, in *Tillotson v. Wolcott*, 48 N. Y. 188, "public policy requires such a construction of the statute as will insure its full benefit to the debtor. It would be useless to grant the privilege contained in the statute if it could be rendered of no effect by refusing an adequate remedy for the invasion of the exemption, or by permitting a recovery, when obtained for such invasion, to be wrested from the debtor by proceedings on behalf of creditors. The judgment, when recovered by the debtor for the wrongful invasion of his privilege of the exemption of his property from levy and sale, represents the property for the value of which it was recovered": Page 190. In the case where this language was used, it was sought to reach, by proceedings supplementary to execution, a judgment recovered for the value of exempt property, and it was held that it could not be done: *Commissioners v. Riley*, 75 N. C. 144.

It is said the party entitled to the exemption could in this case have fully protected himself by bringing his action of replevin, and have recovered the exempt property. But the counsel on the other side gives a complete answer to this position by saying that the action of trover and replevin are concurrent remedies, and that the plaintiff could pursue either remedy, and further, that under the statute of replevin, the defendant could bond the property, in which case the plaintiff's judgment would be for the recovery of the property or its value. We do not think the plaintiff lost his exemption by bringing the action in the form he did. The judgment for the exempt property is exempt, we think, contrary to the inti-

mation in *Mallory v. Norton*, 21 Barb. 424. In *Temple v. Scott*, 3 Minn. 419, the supreme court of Minnesota reached a different conclusion, and held that the exemption did not attach to the judgment which represented the value of the exempt property. But we must hold otherwise, because we think that the exemption of the statute must attach to it, in order to give full effect to the intention of the legislation upon the subject. In *Watkins v. Blatschinski*, 40 Wis. 347, it was decided that the money due a judgment debtor from the purchaser of his homestead as a part consideration therefor, and which the debtor intended in good faith to apply to the purchase of another homestead, was not liable to garnishment. It was said that the right given by the law to a debtor to sell and convey the homestead free from all liens would be a barren right, so far as the owner was concerned, if the proceeds of the sale could not be protected until they reached the hands of the vendor, or while in transition from one homestead sold to another purchased. So here it may be said the privilege of the exemption of the stock of goods would be a barren right if the judgment rendered for its value could be discharged by applying the amount on another judgment against the debtor. The entire judgment in this case was exempt, including the costs taxed in the action brought to vindicate the right which the law secured the debtor.

It follows from these views that the orders entered on the twenty-first day of October, 1889, — one denying the defendant's motion to set aside and quash the execution in the action, and the other granting the plaintiff's motion to set aside and cancel the satisfaction of judgment, and declaring the judgment in full force, — must both be affirmed. The costs on the motion were in the discretion of the court, and we shall not disturb the action of the court on that point. Counsel says on the motion to set aside the execution there was not the slightest allusion in the motion papers to the matter of exemption. This position is not sustained by the record. Robbins says, in substance, in his affidavit, that he tendered the balance due on the judgment to the attorneys of the plaintiff, and that they refused the tender "upon the ground that the judgment herein was for exempt property belonging to the plaintiff."

We do not think there was any error in the ruling of the court denying the defendant's motion to reopen the first two orders. The court had already decided and entered these orders, and it would have been irregular to set them aside and

try a new issue raised at that stage of the proceedings, as to whether or not the plaintiff had other exempt property.

The three orders appealed from are affirmed.

EXEMPTIONS, WHAT IS INCLUDED IN. — A cause of action inuring to a debtor from the wrongful seizure and sale of exempt property is itself exempt, and does not pass to a receiver of the property of the debtor; *Andrews v. Rowan*, 28 How. Pr. 126.

MURRAY v. BUELL.

[76 WISCONSIN, 637.]

ASSIGNMENT CANNOT BE MADE OF A CAUSE OF ACTION ARISING FROM PERSONAL INJURIES resulting in loss of business.

ASSIGNMENT CANNOT BE MADE OF THE RIGHT TO RECOVER DAMAGES FOR A CONSPIRACY to monopolize the coal business of a city, and to drive the assignor out of such business, either at the common law nor under a statute authorizing the assignment of causes of action for assault and battery, or false imprisonment, or other damage to the person.

Shepard and Shepard, Williams, Friend, and Bright, and Winkler, Flanders, Smith, Bottum, and Vilas, for the appellants.

Clarke and McAuliffe, and J. C. McKenney, for the respondent.

CASSODAY, J. The complaint in this action was for an alleged conspiracy of the several defendants for the purpose of controlling and monopolizing the entire coal business in the city of Milwaukee, and preventing all dealers therein from selling at less rates than the prices fixed by them, and thus preventing competition, to the injury of the plaintiff's business, and to drive him and others out of the business; which complaint was, on demurrer, held to state a good cause of action by this court in *Murray v. McGarigle*, 69 Wis. 483. Upon the cause being remitted, and issue joined, the same was subsequently tried, and upon such trial the plaintiff obtained a verdict of \$4,750. The defendants thereupon moved for a new trial, mainly on the ground that such damages were excessive. Thereupon the trial court ordered that if the plaintiff would remit from such verdict \$3,250, and allow the same to stand for the amount of \$1,500 only, the motion for a new trial therein would be denied; otherwise, it would be granted. The plaintiff refused to so remit, and the motion for a new trial was

thereupon granted, and the order granting the same was subsequently affirmed by this court in *Murray v. Buell*, 74 Wis. 14.

It now appears that, prior to obtaining such verdict, and on or about July 1, 1887, the plaintiff, by an instrument in writing, bargained, sold, assigned, and set over to one Thomas F. Clarke the cause of action mentioned in said complaint, which assignment, omitting the title, is as follows:—

“Know all men by these presents, that I, John Murray, of the city and county of Milwaukee, for and in consideration of the procuring sureties and becoming surety for me in the above-entitled action, and of becoming liable for certain costs, expenses, attorney’s fees, and disbursements in the prosecution of said action, do hereby bargain, sell, assign, and set over to Thomas F. Clarke, of the said city and county of Milwaukee, all my right, claim, and interest in and to any and all moneys, property, judgment, and each and every thing of value which may come, arise, or be recovered in this action, or by compromise, settlement, or otherwise, from the above defendants, or growing out of the matters mentioned in this action, for the purpose of securing and reimbursing the said Thomas F. Clarke for his said expenses, outlay, and liability incurred or to be incurred as aforesaid; the said Thomas F. Clarke, being so reimbursed and made whole in the matter, to surrender this contract, and release all further claim against me, and all claim upon the matters and things hereby assigned and set over to him.

[Signed]

“JOHN MURRAY.”

After said cause was remitted from this court on the appeal reported in 74 Wisconsin, 14, and on or about May 27, 1889, the plaintiff, for and in consideration of seven hundred dollars to him paid by the defendants, and by an instrument in writing acknowledging the receipt of the same, thereby remised, released, and forever discharged, and for himself, his heirs, executors, administrators, and assigns, remised, released, and forever discharged, the said defendants, their heirs, executors, and administrators, of and from all debts, demands, actions, and causes of action which he then had, or which might result from the existing state of things, from any and all contracts, liabilities, and omissions, and especially from all claims and liabilities under this action, then pending in the circuit court against the defendants, and from all costs of said action, and thereby confessed and acknowledged full satisfaction of all claims upon which the said action was based; and in consideration of the premises thereby agreed and bound himself to

hold the defendants, and each of them, free and harmless from and against any and all claims which might be thereafter made upon them by his agents, attorneys, or assigns, based upon or in any way arising from said action, or from any of the transactions upon which said action was based.

Thereupon, and on or about May 31, 1889, the said Thomas F. Clarke filed a petition in this case, setting forth a summary of the nature of the case, and said assignment to him by the plaintiff, and his liability as surety for the plaintiff, and the moneys he had advanced in said action for and on account of the plaintiff, and asked the court for an opportunity to present the necessary evidence and to prosecute the action to its final determination, in the name of the plaintiff, as the only way in which he could be relieved from his liability as aforesaid. The defendant thereupon replied to said petition, and the same was tried by the court and a jury, and upon such trial the jury returned a special verdict to the effect that the plaintiff made the assignment to Thomas F. Clarke, mentioned, on July 1, 1887, in good faith and for a valuable consideration; that said Thomas F. Clarke, in pursuance of said assignment, became liable for and laid out and expended money for the plaintiff, in the sum of \$586; that the defendant Buell, at the time of the settlement with the plaintiff, May 27, 1889, had knowledge or notice of the said assignment; that it was one of the objects of the coal association to regulate and control the prices of coal in the retail trade in the city of Milwaukee; that it was one of the objects of said coal association to drive out of the coal business any person who should sell coal at prices less than those fixed by said association; that the defendants, or some of them, at or after the execution of the first agreement between Buell and McGarigle, did an overt act or acts which affected the plaintiff, for the purpose of carrying out such objects of said coal association; that the plaintiff was driven out of the business under the first contract between Buell and McGarigle, by reason of such acts; that the plaintiff sustained damages to the amount of \$586. The court ordered judgment for the sum last mentioned, upon such special verdict, in favor of the plaintiff and against the defendants. From the judgment entered accordingly upon such verdict, the defendants appeal.

However ungrateful it may have been in the plaintiff, nearly two years after he had assigned his alleged cause of action to Thomas F. Clarke, and after the latter had, on the

faith of such assignment, incurred the liabilities and advanced the moneys in the action, mentioned in the foregoing statement, to settle with the defendants, and to release and discharge them from any and all liability by reason thereof, as stated, without the knowledge or concurrence of Mr. Clarke, yet we are forced to hold that such cause of action was not assignable, and that Mr. Clarke obtained no right to the same, nor to control or continue the action in the name of the plaintiff or otherwise, by virtue of such assignment. In *Noonan v. Orton*, 34 Wis. 259, 17 Am. Rep. 441, it was held that an action in tort for a personal injury resulting in a special loss to the plaintiff's business did not pass to his general assignee in bankruptcy, for the reason that such cause of action was not assignable. To the same effect, *Gibson v. Gibson*, 43 Wis. 23; 28 Am. Rep. 527; *Kusterer v. Beaver Dam*, 56 Wis. 471; 43 Am. Rep. 725. In the last case mentioned it was held that "a party having a cause of action, in its nature not assignable, cannot, by an agreement before judgment or a verdict thereon, give his attorney any interest therein or in the costs which would be incident to a recovery, which will survive a settlement of the cause of action." That case has since been frequently sanctioned by this and other courts: *Voell v. Kelly*, 64 Wis. 505; *St. Joseph Mfg. Co. v. Miller*, 69 Wis. 391; *Lamont v. Washington G. R. Co.*, 2 Mackey, 502; 47 Am. Rep. 276; *Miller v. Newell*, 20 S. C. 122; 47 Am. Rep. 833. In the case in 69 Wisconsin, above cited, it was held that where a judgment is recovered in such action of tort, and the defendant therein is garnished by a creditor of the plaintiff, and such judgment is subsequently reversed, and such creditor perfects his judgment against the plaintiff in the tort action before the latter recovers another and final judgment against the wrongdoer, the latter judgment is not subject to nor affected by such garnishment; and this was so held on the theory that although such garnishment was in the nature of a compulsory assignment of the judgment so reversed, yet that it did not transfer the cause of action, nor the judgment subsequently obtained therein.

These cases go on the theory that such actions and causes of action for personal injury or injury to business did not survive the death of the plaintiff at common law, nor by section 4253 of the Revised Statutes: *Randall v. Northwestern Tel. Co.*, 54 Wis. 141; 41 Am. Rep. 17; *Farrall v. Shea*, 66 Wis. 565; *Cotter v. Plumer*, 72 Wis. 478. It is claimed, however,

that such cause of action would survive by virtue of chapter 280 of the Laws of 1887, amending that section by the introduction of the words "or other damage to the person," so that the part here applicable now reads: "Actions for assault and battery or false imprisonment, or other damage to the person." But it is very manifest that the conspiracy in question inflicted no injury or damage to the person of the plaintiff. The acts alleged were unlawful and injured his business, and gave him a right of action for damages, but such damages were in no sense "damage to the person" of the plaintiff: *Hiner v. Fond du Lac*, 71 Wis. 81, 82. For a discussion of such injury to the person, see the opinion of Mr. Justice Orton in *Duffies v. Duffies*, 76 Wis. 374; *ante*, p. 79, and the cases therein cited. Since the cause of action here alleged would not have survived, it is very evident it was not assignable, and that Mr. Clarke got nothing by virtue of his assignment.

The judgment of the circuit court is reversed, and the cause is remanded, with directions to dismiss the complaint.

ASSIGNMENT OF CAUSES OF ACTION. — As to what causes of action may and what may not be assigned, see *McKee v. Judd*, 12 N. Y. 622; 64 Am. Dec. 515, and particularly note 516, 517. A right of action for trespass is assignable: *Chouteau v. Boughton*, 100 Mo. 406.

LOOMIS v. ROCKFORD INSURANCE COMPANY.

[77 WISCONSIN, 87.]

INSURANCE, CONTRACT OF, WHEN INDIVISIBLE. — Though insurance is distributed to the different items of insured property, the contract is indivisible if its breach as to one item of the property affects, or may reasonably be supposed to affect, the other items by increasing the risk thereon.

INSURANCE, CONTRACT OF, WHEN DIVISIBLE. — If three houses, and their contents, situate on different farms, are insured, each for a separate amount, by a policy stating the premium as a gross sum, the contract is divisible, so that if there is a breach of condition as to one of the houses, by its conveyance without the assent of the insurer, the policy is not thereby avoided as to the other houses. A recovery should be had in all those cases where the contract is divisible and the different properties are insured for separate sums, and the risk upon some of the property is not affected by the cause which rendered the policy void in part.

ACTION on a policy insuring against loss by fire three houses, and their appurtenances and contents, situate on dif-

ferent farms, in Dane County, Wisconsin. The amount for which each house was insured was designated in the policy, the aggregate amount being eleven hundred dollars. The consideration of the issuance of the policy, as stated therein, was a premium note for \$16.50, which had been paid at maturity. The policy declared that if any change should take place in the title of the property insured, unless consented to by the secretary of the insurer, the policy should be void. After the issuing of the policy, the assured conveyed one of his farms, including the dwelling-house thereon, without the consent of the secretary of the company. Afterwards, one of the houses which the assured continued to own was destroyed by fire, and to recover for the loss thereby sustained, the present action was brought. The defendant resisted recovery, on the ground that the insurance policy constituted an indivisible contract, and a breach of condition having happened as to part of the property insured, that the whole contract was thereby avoided. The trial court sustained defendant's view, and nonsuited the plaintiff, who thereupon appealed.

Rogers and Hall, for the appellant.

H. W. Chynoweth, for the respondent.

LYON, J. If, as the learned circuit judge held, the contract of insurance is entire and indivisible, the conveyance by the plaintiff of the Burke farm, on which stood dwelling-house No. 1, without the consent of the secretary of the defendant company, before certain other of the insured property was burned, renders the whole policy null and void, and the nonsuit was properly ordered; otherwise not. In the cases of *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159, and *Schumitsch v. American Ins. Co.*, 48 Wis. 26, the contracts of insurance there in question were held indivisible. In those cases, the property insured consisted of buildings, and personal property contained therein; and in the applications for the policies, there were misrepresentations by the assured of their title to the realty. In each case, the risk was distributed to the different items of property insured. These cases will be adhered to, and the question is, whether they rule the present case.

There is some apparent conflict of authority as to the rules by which it is to be determined whether the contract in a

given case, which insures several items of property, is an entire contract, or whether it is divisible. An examination of the cases will show, we think, that as to a large majority of them, the conflict is apparent, rather than real. All the cases seem to agree that although the insurance is distributed to the different items of insured property, the contract is indivisible if the breach of the contract as to an item of the property affects, or may reasonably be supposed to affect, the other items, by increasing the risk thereon.

In *Fire Ass'n v. Williamson*, 26 Pa. St. 196, the insurance was upon three adjoining buildings, — a specified sum on each, — and the breach of the contract alleged was the keeping of gunpowder in one of the buildings, which caused the burning of them all. The contract was held indivisible. In *Gottzman v. Pennsylvania Ins. Co.*, 56 Pa. St. 210, 94 Am. Dec. 55, the insurance was distributed upon a barn, and certain property in a hotel standing within about sixty feet of the barn. As in the cases in this court above cited, the assured misrepresented his title to the real property, which misrepresentation, by the terms of the policy, invalidated the whole insurance. The property in the hotel was burned. The contract was held indivisible, and the whole insurance forfeited. Several Massachusetts cases are cited in the opinion, among which are *Friesmuth v. Agawam M. F. Ins. Co.*, 10 Cush. 590; *Brown v. People's M. Ins. Co.*, 11 Cush. 280; and *Kimball v. Howard F. Ins. Co.*, 8 Gray, 38. These cases, in their essential facts, are, in principle, like the above cases in this court, except that in the case last cited there was no misrepresentation, but the assured obtained additional insurance upon a portion of the insured property, contrary to the conditions of the policy. *Lee v. Howard F. Ins. Co.*, 3 Gray, 583, is also cited. In that case, the contract of insurance was held indivisible because, by the terms of the policy, "the property was insured as one risk, and was in fact closely connected together." In *Kelly v. Humboldt F. Ins. Co.*, Pa., Nov., 1886, the insurance was for a specified sum on each of two connected buildings, and a house situated in the rear of them. The contract was held indivisible, on the authority of the cases in that state above cited. In *Bowman v. Franklin F. Ins. Co.*, 40 Md. 620, the insurance was distributed upon a distillery, and machinery therein, and there was a breach of the condition as to the real estate, which worked a forfeiture of the policy, by its terms. *Lovejoy v. Augusta M. F. Ins. Co.*,

45 Me. 472, and *Day v. Charter Oak F. & M. Ins. Co.*, 51 Me. 91, are also similar in principle to the two cases in this court first above cited. The property insured in each was a building and its contents, and there was a misrepresentation by the assured of his title to the realty.

None of the above cases seem to have been decided upon the proposition that the contract was entire merely because the premium was not also distributed to the several items of insured property, yet there are expressions in some of the opinions which seem to give weight to that circumstance. But in *Plath v. Minnesota F. M. F. Ins. Ass'n*, 23 Minn. 479, 23 Am. Rep. 697, and *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202, the contracts seem to have been held indivisible mainly upon the ground that the premiums were not so distributed.

The foregoing cases have been referred to at some length because they are chiefly relied upon by the learned counsel for the defendant company, to establish the invalidity of the contract of insurance in the present case, and because they are believed fairly to represent nearly all the cases in which such contracts have been held indivisible. The same counsel also cited and relied upon *McGowan v. People's M. F. Ins. Co.*, 54 Vt. 211; 41 Am. Rep. 843. The facts of that case are not very fully stated, but it may be gathered from the report that the insurance was upon a dwelling-house and personal property in it, and the assured mortgaged the realty, contrary to a condition in his policy. It was there claimed that the contract was divisible, and that the assured should recover the insurance upon the personal property which had been burned, although the policy had become void as to the dwelling-house. The court negatived this claim, and held the contract indivisible. The decision is placed upon the ground that by the terms of the policy the insurer had a lien upon the insured buildings for the payment of assessments upon the premium note, and the cause which rendered the policy void as to the buildings affected such security. The court might well have held, also, that the contract was entire because of the fact that the personal property insured was located in such buildings, and any breach of the contract in respect to the buildings must necessarily affect the risk upon the property therein, to the injury of the insurer. In that case the court laid down general rules for determining whether such a contract is divisible or not. These rules are so reasonable and satisfactory that we feel justified in quoting some-

what at length from the opinion. The court says: "This is a question of great practical importance, as a large proportion of insurance contracts embrace more than one item of property insured. The decisions are apparently conflicting, but, we think, are easily reconciled by referring to the plain principles which should govern them. The general rule, 'void in part, void *in toto*,' should apply to all cases where the contract is affected by some all-pervading vice, such as fraud, or some unlawful act condemned by public policy or the common law; cases where the contract is entire, and not divisible; and all those cases where the matter that renders the policy void in part, and the result of its being so rendered void, affects the risk of the insurer upon the other items in the contract. Keeping these rules in mind, the leading cases upon this subject can all be reconciled. A recovery should be had in all those cases where the contract is divisible, the different properties insured for separate sums, and the risk upon the property, which is claimed to be valid, unaffected by the cause that renders the policy void in part. Such are the cases of *Howard F. & M. Ins. Co. v. Cornick*, 24 Ill. 455; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164; *Clark v. New England M. F. Ins. Co.*, 6 Cush. 342; 53 Am. Dec. 44; *Date v. Gore D. M. F. Ins. Co.*, 14 U. C. C. P. 548; *Phœnix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; 81 Am. Dec. 521; *Loehner v. Home M. Ins. Co.*, 17 Mo. 247; *Koentz v. Hannibal Savings & Ins. Co.*, 42 Mo. 126; 97 Am. Dec. 325; *Cucullu v. Orleans Ins. Co.*, 6 Martin, N. S., 11."

It is believed that the rules thus laid down by the Vermont court do not conflict with any of the cases above referred to, except possibly the two cases in Minnesota and Iowa. The proposition determined in those two cases does not commend itself to our judgments as sound. While the fact that the premium is stated in the policy at a gross sum, and is not distributed to the different items of insured property, is a circumstance to be considered in interpreting the contract, we do not think it is controlling. If two houses, located one mile apart, are insured in the same policy for one thousand dollars each, and there is nothing to show that they do not belong to the same class of risks, we cannot believe that, merely because the premium is stated in the policy to be twenty dollars on both houses, instead of ten dollars on each, the contract thereby becomes indivisible, when it would undoubtedly have been divisible had the latter formula been adopted.

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In the present case the aggregate of the insurance is \$1,100, and the premium is stated in gross at \$16.50, which is $1\frac{1}{2}$ per cent on the amount of the insurance. There is nothing in the policy or testimony to show that the insured property belonged in different classes, upon which are charged, respectively, different rates of insurance, or that the percentage of premium is an average between higher and lower rates which the parties understood were charged and paid upon different items of the insured property. The presumption is, therefore, that each item was insured at one and one half per cent premium, and the contract should be construed as though it was so expressed in the policy. Had it been so expressed therein, there can be no doubt the contract would be divisible, and so the learned counsel for the defendant company frankly admitted during the argument of the cause.

The views above indicated are fully sustained by the cases of *Clark v. New England M. F. Ins. Co.*, 6 Cush. 342; 53 Am. Dec. 44; *Havens v. Home Ins. Co.*, 111 Ind. 90; 60 Am. Rep. 689; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; 29 Am. Rep. 184; *Schuster v. Dutchess Co. Ins. Co.*, 102 N. Y. 260; *Loehner v. Home M. Ins. Co.*, 17 Mo. 247; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507. Indeed, many of the above cases go much further than this court has gone, in asserting the divisibility of such contracts.

It is not denied that the policy in suit was valid when issued. No misrepresentation or breach of warranty on the part of the assured is claimed. But after the policy was issued, the assured violated one of its material conditions by conveying to another one of the insured houses, without consent of the insurer, which certainly invalidated the policy as to that house. But it is quite impossible to say from the record before us that the risk upon the insured property destroyed by fire, which property was located five miles distant from the house so conveyed, was increased, or in the slightest degree affected, by such conveyance. We are constrained to hold, therefore, that the contract is divisible, and hence that it was error to nonsuit the plaintiff.

The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

INSURANCE — DIVISIBILITY OF CONTRACT. — Where property covered by insurance, although consisting of separate items, constitutes substantially one risk, and is necessarily subject to destruction by the same fire, then,

even though separate amounts of insurance are apportioned to each separate item, if the consideration for the contract and the risk are both indivisible, the contract must be considered as entire, and any breach of condition which renders the policy void as to a part affects the other items in the same manner: *Geiss v. Franklin Ins. Co.*, 123 Ind. 172; 18 Am. St. Rep. 324; *Havens v. Home Ins. Co.*, 111 Ind. 90; 60 Am. Rep. 689; compare *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393. A policy of insurance covering a house and the personal property in it is indivisible, and a breach of warranty which will avoid the policy as to either the realty or personalty will avoid the whole policy; but where the policy covers several houses, so situated as to make the risks separate, the policy is divisible: *Pickel v. Phenix Ins. Co.*, 119 Ind. 291.

MARLET v. HINMAN.

[77 WISCONSIN, 136.]

REGISTRATION—CHATTEL MORTGAGE, WHAT IS A FILING OF.—If a mortgagor, at the request of his mortgagee, takes a chattel mortgage to the proper town clerk's office and hands it to him, and he takes it into his possession and files it, it is duly filed, and operates as constructive notice to subsequent purchasers, though before their purchase it is abstracted through the negligence or misconduct of the town clerk, but without the fault of the mortgagee.

R. H. Start, for the appellant.

J. R. Mathews, for the respondent.

CASSODAY, J. This is an action of replevin brought by the plaintiff, as chattel mortgagee, to recover the possession of a pair of steers. The facts are undisputed, and to the effect that, October 22, 1887, John F. Brewer and wife, in the absence of the plaintiff, but at his request, executed a chattel mortgage on the steers in question to the plaintiff, to secure the sum of \$61.67; that said Brewer, at the plaintiff's request, thereupon took the said mortgage to the proper town clerk's office, and handed the same to said town clerk, who took the same into his possession, and filed it as of that day, making the following entry in his indexed book of chattel mortgages, to wit: "John F. Brewer to John Marlet, October 24, 1887. \$61.67. Dated October 22, 1887; due October 22, 1888." November 1, 1887, said Brewer sold and delivered said steers to one Blakely for a full and valuable consideration, who then and there purchased the same in good faith, and without notice of the existence of said mortgage, and upon the representations of said Brewer that the same were free and clear of all liens, and that there was no chattel mortgage thereon. The next day said Blakely, having heard

that there was a chattel mortgage on the steers, given by Brewer, at once went to said town clerk's office, and in connection with the son of said clerk, made a thorough and diligent search among the files and papers of said office and all the chattel-mortgage files therein, but no such mortgage or copy thereof could be found in said office. None such, nor any copy thereof, was on file in said office, and neither said mortgage, nor any copy thereof, has since been on file in said office. November 30, 1887, said Blakely, for a full and valuable consideration, sold and delivered said steers to one Pettit, who bought the same in good faith, and without any notice of the existence of any such mortgage, and relying upon the representations of said Blakely at the time of sale, that there was no mortgage upon said steers. Thereupon said Pettit heard there was a chattel mortgage on the steers, and at once went to said town clerk's office, and was then and there informed by said clerk that there was no such mortgage nor any copy thereof on file in his office. December 15, 1887, said Pettit, for a full and valuable consideration, sold said steers to the defendant, who then and there purchased the same in good faith, and without any notice of the existence of any such mortgage, and relying upon information given him by said Pettit, at the time of such purchase, to the effect that the steers were free from any and all mortgage liens, and that he had been informed by the said town clerk that there was no mortgage thereon on file in his office.

Said mortgage was never taken from said files or town clerk's office by the plaintiff, or with his knowledge or consent, and he did not know that the same had been taken therefrom until after the defendant had so purchased said steers. During the time mentioned, the said Blakely and Pettit were each and both financially irresponsible and insolvent. Before the commencement of this action the plaintiff demanded said steers of the defendant, who refused to give them up. Their value at the time of such demand was sixty dollars. The debt on which said mortgage was given has never been paid nor satisfied. The books in the town clerk's office do not show that the mortgage was ever canceled. The mortgage filed therein was the original, and not a copy.

Upon the trial of the action a jury was waived, and the facts in the case, substantially as stated, were stipulated by the parties; and the court thereupon found the facts as stated in said stipulation, and, as conclusions of law, that the plaintiff

should have judgment for the return of the steers, or for the value thereof in case a return could not be had, with six cents damages for the detention thereof, with costs. From the judgment entered accordingly upon said findings in favor of the plaintiff, the defendant appeals.

"No mortgage of personal property shall be valid against any other person than the parties thereto, unless the possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage or a copy thereof be filed as provided in the next section, except when otherwise directed in these statutes": R. S., sec. 2313. The exceptions referred to have no application here. The next section thus mentioned provides that "every mortgage of personal property, or a copy thereof, may be filed in the office of the clerk of the town where the mortgagor resides. . . . Such clerk shall indorse on such mortgage or copy the time of receiving the same, and keep the same in his office for the inspection of all persons. Such clerk shall also make the entries as required in subdivision 10 in section 832. Mortgages so filed shall be as valid and binding upon all persons as if the property thereby mortgaged had been, immediately upon the execution of such mortgage, delivered to, and the possession thereof retained by, the mortgagee: R. S., sec. 2314. The entries which section 832 thus requires the town clerk to make were "to file, when presented, all chattel mortgages and affidavits relating thereto, and to enter at the time of filing, in a book properly ruled and kept therefor, the names of all the parties, arranging mortgagors alphabetically, the date of each mortgage, and the date of filing the same, and of each affidavit relating thereto": Subd. 10.

Was the mortgage in question "filed," within the meaning of the statutes quoted? It will appear from the foregoing statement that the "entries" which the town clerk was thus required to make in his index-book were in fact made by him at the time the mortgage was delivered to and left with him. This court has gone so far as to hold, however, that the requirement of such entries to be made is merely directory, and not essential to the validity of such filing: *Smith v. Waggoner*, 50 Wis. 155. The statutes cited make it the duty of the clerk "to file" the mortgage or copy when presented, and to "indorse" thereon "the time of receiving the same." In the case cited, it is said by Mr. Justice Orton that "these provisions are easily understood, and make the filing of the

mortgage and the indorsement thereof the principal things to be done as affecting the validity of the mortgage, and notice to all persons interested": *Smith v. Waggoner*, 50 Wis. 160. In legal contemplation, the filing of the mortgage was complete when delivered to, received by, and left with the town clerk for that purpose: *Smith v. Waggoner*, 50 Wis. 160; *Gorham v. Summers*, 25 Minn. 81; *People v. Bristol*, 35 Mich. 28; *Keating v. Retan*, 80 Mich. 324. The requirement of section 832 of the Revised Statutes, quoted, making it the duty of the town clerk "to file" such mortgage when presented, is nothing more than to receive the same and make the indorsement thereon required by section 2314, quoted. The stipulation to the effect that when the mortgage was handed to the town clerk, he "took the same into his possession and filed it as of that day," clearly means that he took the mortgage into his official custody, and indorsed thereon "the time of receiving the same," within the meaning of the section last cited. True, it was so delivered to the town clerk by the mortgagor, but since he did so at the request and as the agent of the plaintiff, though in his absence, the filing was just as effectual as though such delivery had been made by the mortgagee himself: *Sargeant v. Solberg*, 22 Wis. 136; *Harrington v. Brittan*, 23 Wis. 541. But the mere fact that the mortgagor was the agent of the mortgagee in thus filing the mortgage gave him no implied authority to conceal the same in the office of the town clerk, and much less to remove the same from the files or the office: *Case v. Jewett*, 13 Wis. 498; 80 Am. Dec. 752. In the case at bar there is no evidence of any such concealment or removal by the mortgagor. There is nothing in the record accounting or attempting to account for the absence of the mortgage from the files or the office. It does appear, however, that it was not taken therefrom by the plaintiff, nor with his knowledge or consent, and that he did not know that the same had been taken therefrom until after the purchase of the steers by the defendant. It follows from what has been said that the mortgage was duly filed.

The mortgage being "so filed," the statute quoted expressly declares that it "shall be as valid and binding upon all persons as if the property thereby mortgaged had been, immediately upon the execution of such mortgage, delivered to, and the possession thereof retained by, the mortgagee": Sec. 2314. The question recurs whether the plaintiff is to be deprived of these statutory provisions in his favor, without any fault,

negligence, or privity of his own, and solely by reason of the negligence or misconduct of the clerk. "It is the settled law of this state that the mortgagee of chattels has the legal title to the property before the debt is due, and that he may take immediate possession thereof, unless by express stipulation the mortgagor is permitted to retain possession": *Hill v. Meriman*, 72 Wis. 486. Such right of the mortgagee was fully protected by such filing of the mortgage, even as against subsequent purchasers for value in good faith. The possession of personal property is at most only *prima facie* evidence of title. A *bona fide* purchaser of such property from one in possession cannot hold the same as against the true owner. Had the mortgage in question remained on file, and the mortgagor had removed to some other town, or even some other state, and there, during the life of the mortgage, sold the steers to a *bona fide* purchaser, yet there is plenty of authority for holding that such purchaser would not thereby have acquired title to the same as against the mortgagee: *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62, and numerous authorities cited in the note; *Keenan v. Stimson*, 32 Minn. 377; *Norris v. Sowles*, 57 Vt. 360. The loss in such supposed case would, under these authorities, fall upon the purchaser. Here there is much stronger reason for holding that it should fall upon the defendant as such purchaser, since he has his remedy against the clerk, by reason of whose misconduct or negligence the loss has been sustained: R. S., secs. 830, 985.

The judgment of the circuit court is affirmed.

FILING OF INSTRUMENTS IN WRITING, WHAT IS, AND EVIDENCE THEREOF: See *Beebe v. Morrell*, 76 Mich. 114; 15 Am. St. Rep. 288, and extended note 294-298.

HEDDLES v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[77 WISCONSIN, 228.]

DAMAGES, MEASURE OF, FOR PERSONAL INJURIES. — In an action to recover compensation for personal injuries which had led to the amputation of the plaintiff's legs, it is not error to instruct the jury that "the proper elements of damages are adequate compensation for all of the physical and mental pain and suffering which the plaintiff suffered at the time of the accident, which he has suffered since that time, and which he is reasonably certain to suffer in the future by reason of his injuries; also for the mortification and anguish which he has suffered, and will in future suffer, by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows."

NEGLIGENCE — DUTY OF RAILWAY CORPORATION TO PERSON APPROACHING THE TRACK. — The mere fact that a traveler is approaching the track is not sufficient to require the engineer to give an alarm or to stop his engine when it is broad daylight, the engine visible, the bell ringing, and the traveler is an adult in apparent possession of his senses, and looking toward the train. In such a case, the engineer may act on the supposition that the traveler will stop; but he must not rest upon this supposition so long as to allow his engine to reach the point where it will become impossible for him to control his train, or give warning in time to prevent injury to the traveler, supposing the latter to continue his course.

WITNESS, CONTRADICTING BY PRIOR STATEMENTS. — If a witness has testified concerning the speed at which a train was running at the time of an accident, and is asked if he did not have a conversation shortly after the accident, and whether he did not then make a statement regarding such rate of speed, to which he replied that he has no recollection as to making such statement, another witness, called to rebut this testimony by discrediting the first witness, may be asked whether he had a conversation in which the first witness made the statement of which he denied having any recollection.

NEGLIGENCE. — EVIDENCE THAT THERE WAS NO SIGN-BOARD AT A RAILWAY CROSSING at which a traveler was injured is admissible in an action by him to recover compensation for such injury.

EVIDENCE NOT PREJUDICIAL. — In an action against a railway corporation to recover for personal injuries suffered by the plaintiff, the reception in evidence of a city ordinance forbidding the blowing of an engine whistle within the city limits except as a necessary signal cannot entitle it to a reversal. The ordinance clearly contemplated that the whistle might be sounded whenever necessary, and its admission in evidence could not have prejudiced the defendant.

EVIDENCE. — ONE WHO WAS IN ATTENDANCE ON AN INJURED PERSON, and saw his condition and his apparent sufferings, may be asked to what extent he suffered. It does not require an expert to give testimony concerning the suffering of another who had been injured by an accident, and of whose apparent sufferings the witness was an observer for several days.

EVIDENCE. — QUESTION AS TO WHAT WAS THE PLAINTIFF'S TEMPER before he was injured is proper, because the answer tends to show his mental condition before he was injured. It is also competent to show his temper afterward, because a comparison of his temper before and after the accident may tend to show that it has resulted in a permanent mental defect.

EVIDENCE. — ANSWER NOT RESPONSIVE TO THE QUESTION ASKED may be stricken out on motion of the party who deems himself injured thereby; but if he does not make such motion, he cannot hold his adversary responsible for the answer, nor successfully seek a new trial on the ground that it was given.

JURY TRIAL — REFERENCE TO PRIOR VERDICT. — Where a verdict for damages sustained by personal injuries to the plaintiff had been set aside on appeal as excessive, and the case had again been tried, the fact that counsel for plaintiff referred to the former verdict in an argument to the court in the presence of the jury, and claimed that, in view of additional evidence produced at the second trial, it ought not now to be regarded as excessive, does not entitle the defendant to a reversal, though

he objected to the reference when made, and the trial judge declined to interfere, the verdict in the second trial being for a much less sum than that in the first.

JURY TRIAL. — **VERDICT IS NOT EXCESSIVE** which allows eighteen thousand five hundred dollars for personal injuries to a boy seven years of age, making necessary the amputation of both his legs, and affecting him mentally as well as physically.

ACTION to recover for personal injuries. Plaintiff, traveling along Wall Street, in Janesville, where that street is crossed by defendant's tracks, was run over, his right leg crushed at the knee and the left one at the ankle, and the amputation of both soon afterward became necessary. The engine, as it approached the place of the accident, was running at a greater rate of speed than the six miles an hour allowed by law; the whistle was not blown, though the bell of the engine was rung before and while it was crossing Wall Street; there was no gate erected on Wall Street, though the erection of such gate was necessary for the safety of human life; there was no flagman at the crossing to warn travelers; there was no ordinance requiring such gate or flagman; there was no sign-board at the crossing, with the inscription, "Look out for the cars." The plaintiff was a bright, intelligent boy of his age; comprehended that crossing the railway tracks was attended with danger, but did not see the engine approaching the place of the accident, although shortly before crossing he looked in the direction from which the engine approached; just before starting to cross, his attention was attracted by a train moving upon the track of another railway; when within twenty-five feet of defendant's main track plaintiff could have seen the coming of an engine at the distance of 250 feet south of him, and the engineer could have seen plaintiff for the same distance; the engineer was about fifty feet from plaintiff when he first saw him; at that time there was nothing in plaintiff's action indicating that he was about to stop until the engine passed, before trying to cross the track. When the engineer saw that plaintiff was about to cross he tried to stop the engine, but the plaintiff was then just crossing the track, and was struck by the engine when from two to three feet south of the south side of the northern sidewalk of Wall Street. The defendant's employees were found to be guilty of negligence contributing to plaintiff's injuries, — 1. In not keeping a proper lookout to see that the track was clear; 2. In running at a greater rate of speed than six miles an hour; 3. In not blowing any whistle to warn plaintiff of danger. Jury re-

turned a verdict in favor of plaintiff for eighteen thousand five hundred dollars, and from the judgment entered thereon the defendant appealed.

Winkler, Flanders, Smith, Bottum, and Vilas, for the appellant.

Fethers, Jeffris, and Fifield, for the respondent.

TAYLOR, J. This is an appeal from the judgment on a second trial of this action. On the first trial an appeal was taken by the defendant, and the judgment was reversed for reasons stated in the opinion of this court: See case reported in 74 Wis. 239. Upon the former appeal it was held by this court that there was sufficient evidence in the case to support the verdict in favor of the plaintiff, and the judgment was reversed for errors occurring on the trial, and because the damages awarded were, as we thought, excessive. On the second trial there was the same evidence given on the part of the plaintiff as was given on the first trial, and some additional evidence was produced which materially strengthened the case upon the merits in favor of the plaintiff; and the learned counsel for the appellant do not contend, on this appeal, that there is not sufficient evidence to sustain a verdict for the plaintiff, but they allege that certain rulings of the court on the trial were erroneous, and that such errors were prejudicial to the appellant.

The first error assigned is the instructions of the court to the jury on the question of damages. The instruction objected to reads as follows: "The amount of the damages which you will assess is left to your judgment and discretion, considering the proper elements of damages, which are as follows: Adequate compensation for all of the physical and mental pain and suffering which the plaintiff suffered at the time of the accident, which he has suffered since that time, and which he is reasonably certain to suffer in the future, by reason of his injuries; also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows." The learned counsel for the appellant take exceptions to the use of the words, "for the mortification and anguish of mind which he has suffered, and will suffer in the future, by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows."

It is urged that these words convey to the jury an idea different from that conveyed by the words "mental pain and suffering" which resulted from the injury. We think the learned judge only used the expressions excepted to as indicative of the causes from which the mental pain and suffering would be likely to arise from the injury received. There can be no doubt that the loss of the plaintiff's limbs would naturally cause mortification and anguish on the part of the plaintiff, and it is also quite certain that he would be to a considerable extent an object of curiosity, and to the thoughtless and unfeeling, an object of ridicule. We think there was no error in the instructions excepted to. For authorities sustaining the instructions, see the following cases, cited by the counsel for the respondent: *Wilson v. Young*, 31 Wis. 574; *Craker v. Chicago & N. W. R'y Co.*, 36 Wis. 657, 677; *Power v. Harlow*, 57 Mich. 107; *The Oriflamme*, 3 Saw. 397; *Atlanta & R. A. L. R. R. Co. v. Wood*, 48 Ga. 565; *Toledo W. & W. R'y Co. v. Baddeley*, 54 Ill. 19; 5 Am. Rep. 71; *Ballou v. Farnum*, 11 Allen, 73; *Western & A. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320; *McMahon v. Northern etc. R. R. Co.*, 39 Md. 438.

The appellant also excepted to the refusal of the court to give the following instruction: "The engineer was not bound to stop his train or resort to unusual precautions the moment he saw the plaintiff, merely because he was approaching the track. It being broad daylight, and his engine plainly visible, and the bell ringing, he had the right to assume, in the first instance, that the plaintiff would stop in time to escape injury. He had the right to run on until he had evidence that the boy approaching the track was heedless of danger. When he had such notice, he was bound to use all reasonable care and diligence to avoid it." Instead of giving this instruction, the learned judge instructed the jury as follows: "The mere fact that the traveler is approaching the track is not, of itself alone, sufficient to require the engineer to give an alarm or stop his engine, especially where it is in broad daylight, the engine plainly visible, the engine bell ringing, the traveler is an adult in apparent possession of his senses, and looking in the direction of the train. In such a case, the engineer would have the right to assume that the traveler would stop; but he cannot rest on such an assumption so long as to allow his engine to reach a point where it will become impossible for him to control his train or give warning in time to prevent injury to the traveler, supposing the traveler to continue in

his course." We think the instruction as given by the court was sufficiently favorable to the defendant, and that the instruction asked was properly refused, because it did not fairly present the case to the jury as it was made by the evidence in the case.

The third exception is taken to the following testimony, given by the witness Macloon. Macloon was examined as to a conversation he had with the engineer, Roberts, shortly after the accident, and he testified, under objection, that Roberts in that conversation said: "There is no use talking about six miles an hour. We could n't do the work if we ran only six miles an hour, and we have to run faster." Roberts had been questioned as to this alleged statement, and he said he had no recollection of making such statement or of having any such conversation. Macloon was called on rebuttal, and asked about such conversation, for the purpose of discrediting the evidence of Roberts as to the speed of the train. As this evidence was offered, not as original evidence for the plaintiff as to the speed of the train, but for the purpose of discrediting the evidence of Roberts on that question, we think it was properly admitted. It was substantially so determined on the former hearing in this case: See 74 Wis. 252.

The fourth exception to the evidence offered by the plaintiff, showing that there was no sign-board at the crossing where the accident happened, was not well taken, as was decided by this court in the case of *Winstanley v. Chicago etc. R'y Co.*, 72 Wis. 375, 380.

The fifth exception was to the introduction of the city ordinance forbidding the blowing of the engine whistle "within the city limits, except as a necessary signal or to prevent accidents." We think there was no error in admitting this ordinance. It could not prejudice the defendant if the circumstances were such as did not render it necessary to blow the whistle to prevent an accident, and if, under all the circumstances, the jury should be of the opinion that the whistle should have been blown to prevent the accident, the ordinance did not forbid its being blown. As said in the former opinion, "The ordinance clearly contemplated that the whistle might be sounded whenever it should become necessary as a signal or to prevent accidents." We are unable to see how the admitting of this ordinance in evidence could have prejudiced the defendant.

The sixth exception is to a question asked of Elizabeth

Spence, a witness for the plaintiff, who had testified that she had been in attendance upon the plaintiff for three or four weeks after he was injured. She said she "was with him the first night after the injury. He suffered very much. He suffered very greatly, and I could see that in his expression how he suffered, and every now and then he would lose his consciousness." Then the witness was asked this question: "To what extent, apparently?" To this question the defendant objected. The court overruled the objection, and the witness answered: "It was very bad. I can't tell, for it was so bad." Certainly, when this answer of the witness is considered in connection with the other evidence in the case, as to what the plaintiff suffered from the accident, it is evident that it could not have prejudiced the defendant. We are of the opinion that this witness, from what she saw of the plaintiff and his condition for two or three weeks after his injury, was competent to state as a fact whether he suffered greatly or not. It would not require an expert to give an opinion, if the question can be said to call for an opinion instead of a fact which was apparent to her observation.

The seventh error assigned was the overruling of an objection to the following question asked of the father of the plaintiff: "What was the boy's temper before he was injured?" The answer was: "He was of bright and cheerful temper. Now he is very irritable, and if anything excites him he seems to be uncontrollable." It would seem that the question was a very proper one, as showing that the boy's mental condition was sound before the injury; and we are also of the opinion that the answer as to his mental condition after the injury, although not responsive to the question, was admissible. It would seem that if an injury caused a permanent mental defect or disease, it would be equally as good ground for the recovery of damages as though a physical defect or disease was the result. But the question did not call for the mental condition of the boy after the injury; and if the defense objected to the witness stating what such condition was after his injury, he should have moved to strike out that part of the answer stating such condition. It was not called for by the question objected to, and the plaintiff is not responsible except for that part of the witness's answer which is responsive to the question propounded. The ruling of the court that the question was admissible was not a ruling that that part of the

answer not responsive to the question was or was not admissible.

After the testimony was closed, the counsel for the plaintiff addressed the court as follows: "Upon this trial what was problematical or theoretical is demonstrated; and the proof is here of the failure or decadence or stoppage, whatever view you take of it, of the mental faculties themselves. His memory is not so good. He is duller. He cannot learn so well. Now, I claim, with that feature added, that the verdict of thirty thousand dollars was not excessive, and that in giving the instructions to this jury upon a proper amount, that this court should have in mind, when thinking of what the supreme court has said upon the matter, that there is this additional feature in the case."

These remarks were objected to by the defendant, and an exception was taken to the remarks of counsel as to what the verdict in the previous trial was. To this exception the court remarked: "You may preserve your exception. I cannot dictate to counsel in advance. Counsel stands here and claims to be making a legal argument, and I cannot say that he is not making a legal argument to the court." We are unable to see any impropriety in the remarks of counsel as above quoted. Counsel had the right to claim, if the testimony in the case made a stronger case for damages than on the first trial, that the fact that this court had declared that in their opinion the former verdict was too large should not govern the court in instructing the jury upon that point in the present trial. These remarks were not so outside of the case as to justify a reversal of the judgment, especially as the verdict shows that they could not have prejudiced the defendant on the question of damages, the jury in this case fixing the damages at eighteen thousand five hundred dollars, — eleven thousand five hundred dollars less than the verdict on the first trial.

The ninth error assigned is, that the damages assessed are excessive. The counsel for the appellant has not urged this point upon the court in his oral argument. To the ordinary young man, eighteen thousand five hundred dollars is a large sum of money; but we cannot say that it is too large a sum to make him compensation for an injury which has to a great extent destroyed his capacity to contend successfully with his fellows for those things which make life enjoyable and happy, and which has left him in such a state, both physically and mentally, as must render his life a burden hard to bear.

The case seems to have been fairly tried upon the merits, and none of the exceptions taken seem to us of sufficient importance to justify a reversal of the judgment.

The judgment of the circuit court is affirmed.

DAMAGES FOR PERSONAL INJURIES, ELEMENTS OF. — In actions to recover damages for personal injuries, the jury may take into consideration not only the physical injury and physical suffering, and the expenses and loss of time and wages, but also the mental anguish, shame, and dishonor suffered by the plaintiff: *Beck v. Thompson*, 31 W. Va. 459; 13 Am. St. Rep. 870; see also *Stutz v. Chicago etc. R'y Co.*, 73 Wis. 147; 9 Am. St. Rep. 769, and note; *Weber v. Creston*, 75 Iowa, 16. In such actions, the plaintiff is entitled to recover damages, not only for loss of time and actual expenditures growing directly out of the wrong, but for physical and mental suffering, and for any permanent injuries that are reasonably certain to accrue therefrom: *Alexander v. Humber*, 86 Ky. 565; *Wallace v. Railroad Co.*, 104 N. C. 442; *Chicago etc. R'y Co. v. Starmer*, 26 Neb. 630; *Feeney v. Long Island R. R. Co.*, 116 N. Y. 376. But mere speculative damages are not recoverable: *Fisher v. Jansen*, 128 Ill. 549.

RAILROAD COMPANIES. — DUTY TO PERSONS APPROACHING TRACK: See *Dyson v. New York etc. R. R. Co.*, 57 Conn. 9; 14 Am. St. Rep. 82, and particularly note; *Illinois C. R. R. Co. v. Slater*, 129 Ill. 91; 16 Am. St. Rep. 242. A railroad company must provide for a careful lookout in the direction in which a train is moving, in places where persons are liable to come upon the track: *Heddles v. Chicago etc. R'y Co.*, 74 Wis. 239. Warning may be given of the approach of a train by ringing a bell or blowing a whistle: *Mobile etc. R'y Co. v. Davis*, 130 Ill. 146; *Menard v. Boston etc. R'y Co.*, 150 Mass. 386; or by a flagman stationed at the crossing: *Chicago etc. R'y Co. v. Lane*, 130 Ill. 117. The mere absence of a flagman, however, at the crossing is not negligence *ipso facto*: *Freeman v. Duluth etc. R'y Co.*, 74 Mich. 86; *Curraher v. Bridge Co.*, 81 Cal. 98; *Chicago etc. R'y Co. v. Lane*, 130 Ill. 117; nor is the neglect to give signals at a country crossing sufficient to destroy the legal effect of contributory negligence upon the plaintiff's right to recover: *Matta v. Chicago etc. R. R. Co.*, 69 Mich. 109. Yet a railroad company is liable, notwithstanding the contributory negligence of the plaintiff, where it would have avoided the accident by observing an ordinance with respect to the maintenance of gates at crossings, etc.: *Jennings v. St. Louis etc. R'y Co.*, 99 Mo. 394. In Missouri, sign-boards are required by law to be erected at railroad crossings: *King v. Missouri P. R'y Co.*, 98 Mo. 235. In *Freeman v. Duluth etc. R'y Co.*, 74 Mich. 86, it is decided that where the train-men, beyond seventy-five feet from the crossing of a street, cannot see into such street except the straight line where the railroad track crosses it, and the traveler cannot see even the top of the engine until he gets within forty feet of the track, something more than ordinary caution must be used by the company to prevent accidents.

But the person approaching a railroad track must exercise such care as a prudent man would use under similar circumstances: *Gulf etc. R'y Co. v. Anderson*, 76 Tex. 244; *Moberly v. Kansas City etc. R'y Co.*, 98 Mo. 183. And where one goes upon a track without using the proper caution, such as stopping, looking, and listening, he will be precluded from recovering, on account of his contributory negligence: *Butts v. St. Louis etc. R'y Co.*, 98 Mo. 272;

Sabine etc. R'y Co. v. Dean, 76 Tex. 73; unless the company is guilty of reckless negligence in failing to avoid his injury after discovering his presence upon the track: *Barker v. Hannibal etc. R'y Co.*, 98 Mo. 50; *Freeman v. Duluth etc. R'y Co.*, 74 Mich. 86.

MUETZE v. TUTEUR.

[77 WISCONSIN, 286.]

LIBEL. — A BOOK CONTAINING A LIST OF DELINQUENT DEBTORS IS LIBELOUS, and not privileged, if it is published by an association for distribution among its members or subscribers, and its manifest purpose is to coerce payment of claims, the name of each delinquent being dropped from the list and the fact of his having made payment announced as soon as it occurred.

LIBEL — EVIDENCE. — In an action for libel upon plaintiff by causing his name to be published in a book purporting to contain a list of bad debtors, he may show that he was denied credit by a subscriber to the book, who, on being asked why he would not credit plaintiff showed this book, and gave as his reason for denying plaintiff credit that his name was therein.

LIBEL — EVIDENCE IN MITIGATION. — In an action of libel, in representing plaintiff unworthy of credit, the defendant cannot be permitted to prove how many persons plaintiff owed. The evidence which can be received in mitigation must relate, not to specific acts, but to general character and reputation.

LIBEL — SENDING A LETTER THROUGH THE MAILS IN AN ENVELOPE ON WHICH WERE PRINTED the name of an association and the statement that it was an organization for the collection of bad debts is the publication of a libel, because those words imply that the person addressed is a bad character, and ought not to be credited, and that the correspondence inclosed is for the purpose of collecting from him a bad debt.

LIBEL, WHO GUILTY OF. — One who furnished the name of his debtor to be published in a list of bad debtors intended for circulation among the members of the association, where the obvious object of the publication of such list was to coerce payment of debts, is guilty of libel, where it appears that the list had been furnished a member of the association who refused to credit plaintiff, and assigned as his reason therefor the appearance of plaintiff's name in such list, though it was not proved that such member had ever trusted plaintiff or would have trusted him but for the list.

JURY TRIAL. — WHEN THE COURT MAKES A MISTAKE in stating evidence to the jury, from want of distinct recollection of it, it is the duty of counsel to suggest its correction at once, and failing to do so, he waives the error by his silence.

Losey and Woodward, for the appellants.

E. C. Higbee, for the respondent.

ORTON, J. This action is for libel, and the plaintiff recovered \$571. The facts are substantially as follows: —

The plaintiff is a jeweler by trade, but at one time kept a saloon, and traded with the defendants, who were merchants in goods suitable to the saloon business; and finally, up to July, 1883, there was a balance of account against the plaintiff, which the defendants claimed amounted to the sum of \$23.13, but the plaintiff claimed it to be much less than that amount. There was an association, with its central office at Chicago, called "The United States and Canada Dealers' Protective and Detective Association," claimed to have been incorporated under the laws of Illinois (but which had not been), the object of which is stated, on an envelope used by it to inclose correspondence by mail, to be "an organization of business and professional men for collecting bad debts." The answer in respect to the association is as follows: "These defendants admit that they were members of an association known [as above described], and allege that the same is organized for the purpose of protecting dealers giving credit, against worthless debtors, and against those who contract debts and do not pay; and for the further purpose of communicating to the members of such association, for their mutual protection and safety, the names of all persons against whom unsettled claims remain outstanding and unpaid in favor of members of said association, and which names have been reported by members to the central office, after having taken the necessary steps required by the rules of said association to be taken by the members thereof before reporting such names in order to give the debtor ample and full notice thereof and ample opportunity to settle all claims and avoid such report; that the said association publishes a book at regular intervals, giving the names of all persons so reported by members, and against whom there are unsettled claims in favor of members; . . . that said book is distributed only to members of the association, and to no one else whatsoever, and all communications made by any member to said association, or by said association to any of its members, are strictly confidential and secret, for the purpose of their mutual protection and security."

On February 9, 1888, the defendant sent to the plaintiff, at La Crosse, one of the letters of said association, headed by its regular designation, signed by the firm of Isaac Tuteur and Son, in which they say that they have become members of such association, and then state its general purposes, and ask the plaintiff to call and settle, or they shall be obliged to re-

port his name to the association before February 18th, "after which date their matter goes to press." On said eighteenth day of February the plaintiff received another letter through the mail, with a similar heading, and signed "Agent," in which it is said: "I. Tuteur and Son, one of the members of our association, informs me that you have received our association letter in regard to your indebtedness, and that you have failed to respond. Now, before reporting your name to the main office for publication, allow me to inform you as to some of the consequences of being published in this manner as a delinquent." The letter then states the consequences as above stated, and that if the plaintiff did not wish his name so published, he must by all means call on the defendants, and make some satisfactory arrangement in regard to the claim, on or before the twenty-ninth day of February, or his name would go forward to the main office.

On March 1st another letter was written to the plaintiff, dated at Chicago, stating that the defendants, a member of the association, informed them about the claim, and that reasonable time had been given him to pay it, and notifying him that if he did not pay by March 15th, the consequences would be as previously threatened. This letter, with a similar heading, was signed by C. R. Collin as secretary. Another letter was written from Chicago, dated March 10th, notifying plaintiff to make immediate payment of the claim within twenty days, and another one, dated Chicago, June 10, 1888, with a similar notice to pay within ten days. These two last letters were inclosed in an envelope, respectively, and passed through the mail to plaintiff, in La Crosse, and the envelope was indorsed as follows: "Return in twenty days to the United States and Canada Protective and Detective Association, an organization of business and professional men for collecting bad debts. Central Office, 139 Madison Street, Chicago. For Paul Muetze, La Crosse, Wisconsin." Each of these letters or notices was also headed, "Main Office Notice." There were two other letters received by plaintiff from the main office at Chicago,—the first dated August 10th, and the other September 12th; the first notifying plaintiff to pay within twenty days, and the other within eighteen days, inclosed in similar envelopes, excepting the clause "for collecting bad debts," which is omitted. The envelope containing this clause, "collecting bad debts," is of red paper, and these words are in very large type, so as to attract special attention.

After these communications, the plaintiff applied to a Mr. Borreson, a jeweler of La Crosse, for whom he had at one time worked, for credit, or to be trusted for a small amount, and he refused on account of his having received a book of said association containing the name of the plaintiff as a person unworthy of credit. The book was issued July 1, 1888, and contains the plaintiff's name, among many others in various parts of the United States. In a preface to the book, addressed to members, it is stated that the association "is not a collection agency, . . . but uses its influence to make your debtor pay you." When the debtor paid the claim, his name was taken out of the book. As stated in the answer, the debtor is given an opportunity to pay, if he will, before his name is inserted in the book. The several letters are so many threats that the plaintiff's name will be so published if he fails to pay. The defendants had demanded \$23.13, and the letters make the same demand; but the defendant admitted, as a witness, that he had made a mistake of \$3.05 in the account, and that the claim was only \$20.07.

I have stated the facts more fully and explicitly in order to show what are the objects of the association. It is claimed by the learned counsel of the appellants that its purposes were right and honorable, like a railroad company that issued a pamphlet containing the names of its discharged employees, to be circulated among other companies, or commercial agencies, and the like, for mutual protection against unworthy persons. The envelope of two letters from Chicago contains a distinct libel in itself, which could have been read, and probably was read, by many persons not members of the association. They are made to attract special attention, and publish the fact that the association was in correspondence with the plaintiff for the purpose of collecting a bad debt of him, and implies that he is a bad debtor who fails or refuses to pay his honest debts, and that he is unworthy of credit. But this is not all. It is also a public statement that the object and purpose of the association are for "collecting bad debts." The several letters were written and sent to the plaintiff, and such letters are no doubt sent to others, to collect bad debts; and if they fail to pay, their names are published in the book, also for the purpose of collecting bad debts, for as soon as payment is made, the publication of their names is discontinued. They are then published in a list of those who have settled up. In the book in evidence there is such a list of those whose credit is restored

by their having paid up their bad debts. The object is not to protect the members from trusting this class of debtors, but to aid them in coercing payment. This book of the association, with its list of delinquent debtors, is the pillory or punishment threatened and to be endured if they do not pay and until they pay their debts, and then they are discharged. This object is too apparent to be disguised. Why write so many letters, or why write at all to the debtors, if the object be to publish to the members a list of delinquent debtors, or of persons unworthy of credit, to protect them against trusting them? After a debtor has been thus coerced into reluctant payment, he is no more worthy of credit than he was before. Why discontinue his name among the bad debtors, and place it among those who pay their debts? They say, in their address to the members, "it is to make your debtor pay up." It follows that the members, to whom this publication is sent in book form, are not interested in it in any other way than to make their own debtors pay up.

The communications of this association are not only libelous and not privileged, but they would seem to constitute the offense of "threatening communications," as defined in section 4380, Revised Statutes. The complications of this peculiar association, to bring it within the protection of the law, make it difficult to treat less briefly. As we now understand the real character of this association and of its publications, we may apply the law involved in the various exceptions.

1. Was it error to allow the plaintiff to testify that Borreson exhibited the book to him? The learned counsel of the appellant contends that such act could not constitute a libel or publication of a libel, and that the defendants cannot be charged with the responsibility for Borreson's violation of his obligation to keep the names in the book confidential. Probably not, and yet the plaintiff had the right to find out, if he could, why Borreson would not trust him; and it was certainly proper for him to prove, if he could, that it was on account of this publication.

2. Was it error to sustain the plaintiff's objection to the question, put to him on cross-examination, "How many men in this city did you owe besides Tuteur?" The object of this question must have been to justify or mitigate the libel, by showing that the plaintiff had no credit or character for trustworthiness that could suffer by it. There is no principle better settled than that in such cases specific acts cannot be

shown, and that it is a question of general character or reputation alone: *Wilson v. Noonan*, 27 Wis. 598; *Campbell v. Campbell*, 54 Wis. 90.

3. Was it error to overrule the motion for a nonsuit? It is contended that the letters of the defendant to the plaintiff were not in themselves libelous, and that the other letters sent to him from Chicago were not, and that the defendants were not shown to be responsible for them, and that there was nothing in the book that imputed any bad character to the plaintiff as being unworthy of credit, and that there was no evidence that any other copy of the book, except the one received by Borreson, had been sent to any one, and finally, that the envelopes inclosing two of the letters, containing the words "for collecting bad debts," were not libelous.

The letters were not libelous in themselves, but the defendants' letters were proper to show their connection with the association as one of its members, and with its proceedings against the plaintiff. The defendants set in operation the whole scheme, and caused the other letters to be written and sent to the plaintiff, and they were sent for them and in their behalf. It was through the agency of the association and its officers that all the communications were made to the plaintiff, and finally his name placed in the bad-debtor list in the book of the association, and the defendants were directly responsible for all that was done.

The learned counsel contends that the two envelopes containing the words "for collecting bad debts" were not only not libelous, but a mere violation of the laws of the post-office department, and which were changed as soon as it was decided, about that time, that it was an offense against the postal laws of the United States. Was it not decided that it was an offense because the words were abusive and libelous? There certainly could not have been any other reason. But I have already shown that the words imputed to the plaintiff a bad character and a want of credit, which implied that he was a cheat and a swindler, and that the correspondence inclosed was for the purpose of collecting from him a bad debt.

The book itself claims that they have members all over the country, in whose hands the book is placed; and if Borreson had one it was strong evidence that all the members were supplied with it. At least, such would be the presumption of fact from the declared intention of the association. The plaintiff was notified and threatened in the letter signed by Collin,

the secretary, that if he did not pay up by the fifteenth day of March, 1888, he would be published in their "list of delinquent debtors, which will be delivered to all members of the association in the United States and Canada." The sending through the mail of those envelopes with such an imputation of dishonesty, and the distribution of the book among the members, with the plaintiff's name in the black-list of bad debtors, constituted sufficient publication of the libel. The effect, as well as the intention of these libels, was to discredit and disgrace the plaintiff among business men; and this was the punishment threatened if he did not pay as ordered. If it would work no injury to the delinquent, it would not operate as an inducement for him to pay up.

It is claimed that no special damage to the plaintiff was proved by Borreson refusing to trust him for a small bill of jewelry, because it was not shown that Borreson had ever trusted him, or would have trusted him but for the book. It is sufficient if Borreson refused him credit on account of the book, and the question of special damages was for the jury. This disposes of the reasons urged in support of the defendants' motion for a nonsuit, and also in support of the motion that the court direct the jury to find for the defendants.

4. Errors are assigned on certain instructions to the jury. The learned circuit judge said to the jury: "The evidence shows that three letters, I think, were mailed from La Crosse by the defendants, of this character." The learned counsel claims that this error of fact was very injurious to the defendants, because it would imply that all three of such letters were inclosed in that offensive envelope, when in fact there were only two of such letters. The jury would probably recollect that there were only two of such envelopes, whether they should be misinformed as to the number of letters or not. The statement was not positive, but made rather inquiringly, by the qualification "I think." In such a case, where the court mistakes the evidence in this way from the want of a distinct recollection of it, it is the duty of the counsel to suggest its correction at once, and not silently reserve it for a future exception. He owes this duty to the court. It is not an error of law. We may presume that the jury remembered the evidence for itself, and we cannot presume that they were at all affected by this mistake. The counsel, in such a case, should be held to have waived the error by his silence when

he ought to have spoken. It is not very material any way, and should be disregarded.

The learned judge instructed the jury, in substance, that the communication would not be privileged if made to persons not interested in knowing the standing of the plaintiff; for instance, the members in Canada. This instruction presupposes that the communication was privileged so far as the members were concerned who had an interest in knowing the standing of the plaintiff. This did the defendants no harm, for most clearly the jury correctly found that it was not privileged, and this question was submitted to them by the court. We have seen that there was no object or purpose of the association to protect or serve any one except the creditor interested in collecting the debt. The authorities cited by the learned counsel have no application to such a case. There can be no question but that the communications were grossly libelous. On this general question, see the authorities cited in the brief of the learned counsel of the respondent. In speaking further on the question whether the matter was privileged, the learned judge said to the jury: "Whether it was a communication that was desired, — well, there is no evidence that it was desired by anybody." This is a little obscure, but its meaning was, probably, that no one was interested in the matter except the defendants, and that no one else had any reason to desire it. The jury could not have been materially misled by it, whatever it might mean.

The verdict is not excessive.

The respondent's counsel omitted to argue these various exceptions, because he insisted that the certificate to the bill of exceptions is insufficient to make them a part of the record. The certificate is, that "the above and foregoing was and is all the testimony given on the trial of the above-entitled action." But the bill of exceptions is regularly signed by the judge, as the law requires, and thereby became a part of the record (R. S., sec. 2873), and it contains all the exceptions and the matters to which they relate. That is sufficient. What it contains need not be stated in the certificate, except whether it contains all the evidence. The objection is too technical.

We can find no error in the record.

The judgment of the circuit court is affirmed

LIBEL, WHAT CONSTITUTES. — General publications purporting to disclose the business standing of men, and which are circulated among all the patrons of the commercial agency publishing them, and may therefore reach per-

sons who may not have any special interest in the affairs of him concerning whom they are made, are not privileged: Note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 348, 349; *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768, and note. In *Missouri Pac. R'y Co. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, it is decided that a corporation has the right to publish and circulate among its officers and employees a list of discharged employees who are considered incompetent or untrustworthy; and an employee whose name appears upon such list cannot maintain an action for libel against the corporation, in the absence of proof that the publication was known to be false, and was actuated by malice.

CITY OF JANESVILLE v. CARPENTER.

[77 WISCONSIN, 28.]

INJUNCTION WILL NOT ISSUE TO RESTRAIN THE DRIVING OF PILES IN A RIVER, and the erection of a building thereon, where the injuries alleged as likely to ensue are, that if such building is erected the example will lead other persons to drive other piles and erect other buildings thereon in the same river, until the whole space fronting on a bridge across the river is occupied, and the flow of the water will be obstructed to a slight extent, there being no allegation that the proposed building will, in itself, do any harm, or that the defendant had not the right to erect it where he proposes to do.

INJUNCTION WILL NOT BE ISSUED TO RESTRAIN A NUISANCE, public or private, unless it amounts to a material annoyance, inconvenience, discomfort, or hurt, and the violation of another's rights in an essential degree. The law gives protection only against substantial injury, and the injury must be tangible, or the comfort, enjoyment, or use must be materially impaired.

INJUNCTION WILL NOT ISSUE AGAINST THE CONSTRUCTION OF A BUILDING, on the ground that it will be in violation of a city ordinance.

CONSTITUTIONAL LAW — STATUTE DECLARING THAT TO BE A NUISANCE AND A GROUND FOR INJUNCTION WHICH IS NOT. — A statute to the effect that it shall be unlawful and presumptively injurious and dangerous to persons and property to drive piles or build cribs or other structures in a designated river, within the limits of R. County, and that the doing of such an act shall be enjoined at the suit of any resident tax-payer without proof that any injury or danger has been or will be caused by reason of such act, and shall also be enjoined at the suit of any owner or lessee of the right to use water in such river to operate any mill or factory within said county without proof of any further fact than that such act will cause the water of such river to rise or set back, to some extent, at the place where the water used to operate such mill or factory is discharged into said river, is unconstitutional and void.

RIPIARIAN OWNER OF LAND ADJACENT TO THE WATER MAY CONSTRUCT DOCKS, LANDINGS, PIERS, AND WHARVES out to navigable waters, if the water is navigable in fact, and if not so navigable, he may construct anything he pleases to the thread of the stream, unless he injures some other riparian proprietor or those having a superior right to use the water for hydraulic purposes.

CONSTITUTIONAL LAW. — RIPARIAN OWNER'S RIGHT TO BUILD IN FRONT OF HIS LAND OUT TO NAVIGABLE WATER cannot be taken away, or its value lessened or impaired, even for public use, without compensation, or without due process of law, and it cannot be taken at all for any private use.

CONSTITUTIONAL LAW — TAKING OF PROPERTY, WHAT FORBIDDEN. — Any restriction or interruption of the common or necessary use of property that destroys its value or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of the constitution.

CONSTITUTIONAL LAW. — STATUTE IS VOID BECAUSE IT USURPS THE JUDICIAL POWER of the courts, if it adjudicates an act unlawful and presumptively injurious and dangerous, when it is not so, and commands the courts to enjoin it without proof that any injury or danger has been or will be caused by it.

CONSTITUTIONAL LAW. — STATUTE IS UNCONSTITUTIONAL AS DISCRIMINATING AND CLASS LEGISLATION, if its operation is restricted to part of a river within a county, and it makes acts unlawful there which in all other parts of that river and in all other rivers are lawful, and gives to a class of persons the advantage of maintaining actions without proof that any injury or danger has been or will be caused to them.

CONSTITUTIONAL LAW. — Though a statute does not violate any special clause of the constitution, it may be a violation of its essential spirit, purpose, and intent, and contrary to public justice, and therefore unconstitutional and void.

Winans and Hyzer, for the appellant.

J. B. Doe, Jr., and William Ruger, for the respondent.

ORTON, J. It is charged in the complaint as follows: Many years since, a building known as the Myers Building was erected on the southerly side of and adjoining Milwaukee Street bridge, in the city of Janesville, over the center of Rock River, as the same flowed in its natural state. Said building is forty feet in width, and is supported by large stone piers resting on the bed of said river, and which have so obstructed its flow as to cause a large sand-bar to form in said river, near to and on the down-stream side of the building. Within the period of three years last past, the defendant, Edwin F. Carpenter, erected a building south of and adjoining the southerly side of said bridge, at or near its easterly end, forty feet in width, fronting on said bridge, and extending southerly over said river a distance of one hundred feet, and supported by numerous piles driven into the bed of said river, the most westerly of which being in the channel of said river in or near the deepest water in the same, leaving a vacant space about eighty-seven feet in width between the westerly side of said building so erected by the defendant and the easterly side of said Myers Building. The defendant threatens that he will,

without the permission of or an order from the common council of said city, drive numerous piles into the bed of said river, and erect thereon a building south of and adjoining the south-erly side of said Milwaukee Street bridge, and extending from said building so heretofore erected by him to said Myers Building, and having a frontage of eighty feet or more on said bridge, and extending over and down said river for a distance of about one hundred feet, and commenced the driving of piles in the bed of said river for such purpose. The consequences of permitting the defendant to so erect said building, as affecting the interests of the city of Janesville, will be that others will soon erect buildings fronting on said bridges, and supported in like manner, until the whole space over said river, on both sides of said bridges, is occupied by similar buildings fronting on said bridges, and extending up and down said river a distance of about one hundred feet from the sides of said bridges; and by reason thereof the flow of the water in said river will be further permanently obstructed, and the interests of said city and its inhabitants greatly prejudiced and injured by obstruction to the circulation of air, and in respect to the dangers of fire and flood, and to the public health, and as respects equality in the matter of taxation and assessments, and the benefits thereof; and that said building will be in violation of an ordinance of said city against erecting any buildings in said river. As affecting the interests of the other plaintiff, the Janesville Cotton Mills, it is alleged that the erection of said building will cause the waters of said river to set back "to some extent" at the place where the water used by said Janesville Cotton Mills is discharged into said river.

In the affidavit of Edward Ruger, a civil engineer, in support of the complaint, it is stated that said building would, to some extent, cause the water to set back to such place, and in his affidavit, procured by the defendant, it is stated that said building would cause the water to set back on the water-wheels of said Janesville Cotton Mills "to some extent, but to what extent he could not then say, but it would be slight." It is alleged, also, that the Janesville Cotton Mills is a taxpayer of said city, and a corporation, and that Rock River is a public highway, and has been returned as navigable, and has been meandered, and for a great many years a dam across said river, about seventy rods above said bridge, has existed by lawful authority, and that a considerable number of mills

and factories have received their water-power therefrom, and among them the Janesville Cotton Mills.

The complaint shows also that by the foundation of buildings and the building up within the natural margins of the river on the northerly side of the bridge the width of the river has already been diminished one third, and the waters have been set back as far as the dam, and that said Milwaukee Street Bridge and Court Street Bridge have obstructed the flow of the river to a considerable extent, and that the abutments and piling thereof in the bed of the river, and the filling in of earth and other materials, and placing the foundations, walls, and piers for the support of buildings, and the throwing in of ashes and other materials in the bed of the river, have greatly obstructed the river between said bridges and other localities, and that there is danger that other buildings and obstructions will be placed in the river by the example of the defendant.

These are, substantially, the material allegations of the complaint on which the circuit court granted a temporary injunction against the erection of said building. The defendant, after answering said complaint, moved that the said injunction be dissolved. The motion was heard upon the pleadings and one affidavit presented by the defendant, and seven affidavits presented by the plaintiffs, and denied. From the order denying said motion, this appeal is taken.

The answer denies all of the speculative and predicted consequences which the complaint alleges will follow the erection of said building, and the setting back of the water to any extent, and the effect as to the public health, and danger from fire or flood, and the consequences of his pernicious example, and that the river is navigable in fact, and that the bridges are old and dilapidated, and will soon be replaced by iron ones, and some other immaterial allegations; and the other allegations are admitted.

The answer then alleges as follows: The Rock River throughout its whole length is crossed and obstructed by dams, bridges, and buildings, and other structures, and within the city there have been maintained six bridges resting upon piers and piles, four of which were constructed by the city within the space of a mile and a half, and two of them within the space of forty rods. The lower bridge is known as Court Street bridge, and is about forty rods below the proposed building, and its abutments and approaches are built within

the river, and diminish its width so that it is twenty feet narrower at that place than where the defendant's proposed building will be, and three of said bridges are between two dams across the river. The lower dam obstructs the flow of the river so that it is virtually a mill-pond between the dams, and the water is raised upwards of two feet when it sets back to the upper dam, and the proposed building is between these dams. There are numerous buildings and structures along the bank of the river, resting upon piles driven in the bed of the river, among which are certain buildings of the plaintiff, the Janesville Cotton Mills, and of other mill-owners, and there is a large sand-bar six feet above the bed of the river, between the cotton-mills and the proposed building. The proposed building will be constructed on piles driven into the bed of the river in line with the piles of said Milwaukee Street bridge, and the building itself will be above the river. The piles under the said bridge are driven at an angle to the current of the river, and if piles could obstruct the current (which is denied), such a net-work of piles would do so. The defendant acquired his title in fee to the bed of the river where he proposes to build, from the riparian owner of the lot, one Thomas Lappin. The defendant pleads, in abatement, that several causes of action are improperly united in the same action.

The affidavits in support of the complaint cannot, of course, go further than the complaint in stating the cause of action, and therefore need not be specially referred to. The affiant, Edward Ruger, made affidavits on behalf of both parties, as to the extent to which the waters of the river would be set back below the wheels of the Janesville Cotton Mills, and he leaves the question with the qualification that it would be slight, and the extent of it he could not state. The learned counsel of the appellant contends that the complaint does not show that the proposed building will injure, to any extent, either the city of Janesville or the Janesville Cotton Mills. The condition of the river as to its uses and obstructions, other than by the proposed building, are only material to show that it would be impossible for any one to state the extent, if any, that the proposed building would contribute, by example or otherwise, to produce the consequences, which, if they exist at all, must have already been produced to their fullest extent by other far more adequate causes. How can it be said that the proposed building, standing on piles driven in the river, could, even by example, affect the general health, cause

fires and freshets, obstruct the circulation of the air, affect the equality of taxation and assessments, or the general welfare, when, if any such consequences could be appreciably produced by it, they must have already been overwhelmingly produced by a great many far greater obstructions in the river by dams, bridges, buildings, and other constructions? And precisely so as to its injury to the water-power of the Janesville Cotton Mills, as to which one of the most competent civil engineers of the state was unable to say to what extent it injured it, if at all, and did state that it must be slight. It would seem that if such a comparatively slight cause would produce any effect whatever, such far greater obstructions in the river, which have existed for a long time, must have produced all such consequences to a most astounding and alarming extent, and the city must have suffered in its health, and by polluted atmosphere, by unequal taxation, and by fires and floods, to an extent that would have rendered it uninhabitable, and the water-power of the Janesville Cotton Mills would have been destroyed. These consequences would have been facts susceptible of proof, and yet the complaint fails to show the existence of any such terrible consequences. What effect, if any, this proposed building, by its example, may have in any such direction, so as to injure any private or public interest, is left to mere prediction and conjecture. The action does not involve any question of obstruction or injury to navigation, or of injury to any public right. Many of the consequences to the city predicted would follow as well the erection of said building outside of the river. The complaint does not show that the proposed building would be a private or a public nuisance. The action is based upon the allegations of anticipated injury to the respective plaintiffs, which ought to be prevented by an injunction. It is a private and not a public action. I have stated the case more fully, that we may understand what is involved in it, and what is not.

In respect to injury to any interest that the city represents, the complaint is very obscure and defective. It is not alleged that the public will suffer by this one building at all, but by a row of buildings which somebody might erect in following the example of the defendant, and so, also, as to danger from fire and flood. That will arise only from "similar buildings fronting on the bridges, and supported in like manner, and extending up and down the river from the sides of said bridges until the whole space over said river on both sides of

said bridges is occupied." It is only when such similar buildings erected by others fill that whole space that it is claimed in the complaint "dangers by fire and flood, and to the public health, and as respects equality in the matter of taxation and the benefits thereof," will even arise or occur. The only injury to these interests that is alleged is from what somebody else may do in the future through the influence of the defendant's example, and that is a mere prediction or conjecture. It is not shown how or in what manner such injury could occur. This is a most remarkable case, and there has never been anything like it. It is not charged that the proposed building will in itself do any harm in any respect whatever, or that the defendant has not the right to build it where he proposes to build it, but that it may possibly be followed as an example by others in building buildings which may possibly do harm. It would be a new case, where one had actually done something in itself right and harmless, and he should be sued because others had done something wrong and injurious by following his example; and it would be a strange case, to enjoin one from doing something right and harmless in itself because others may possibly do something wrong and injurious by following his example; and yet the latter is the present case. A mere example is not actionable. Such is the action in favor of the city.

That in favor of the Janesville Cotton Mills is not based on any real injury to its water-power. The charge is, "that the erection of such proposed building by the said defendant, at the place and in the manner aforesaid, would cause the water of said river to rise and set back to some extent at the place where the water used by the said Janesville Cotton Mills to operate its said mill is discharged into the river." It would cause the water to set back at that place to some extent. What harm will it do? Will it retard the action of the water-wheel? Will it lessen the head or fall of the water-power? If it would do either, it would have been easy to say so. It depends upon how high or low the wheels are set. It is not even inferentially stated that it would be any injury at all to the Janesville Cotton Mills. How much will it raise or set back the water at that place? "To some extent." The very least extent possible is some extent. The millionth part of an inch is some extent. The very smallest extent susceptible of measurement is some extent. It seems probable that this expression in the complaint was furnished by

Edward Ruger, the civil engineer who made the affidavit in its support, and used the same language, and who, in another affidavit, qualified it by saying, "to what extent he could not state, but it would be slight." The word "slight," according to Webster, means "inconsiderable, unimportant." If any injury to the water-power could be inferred from this allegation, it would be too slight for legal cognizance. The complaint states no cause of action against the defendant in favor of the Janesville Cotton Mills.

Should a court of chancery enjoin the defendant from erecting his building on his own land, on such an allegation as this? We think the learned counsel of the appellant is right in claiming that the complaint does not charge facts sufficient to state any cause of action known to the general laws of the land and the practice of courts in favor of either plaintiffs. But even if the complaint sufficiently charged that the consequences predicted would be produced by the proposed building, the city of Janesville has no such corporate interest in them as would authorize it to maintain such an action: *Milwaukee v. Milwaukee etc. R. R. Co.*, 7 Wis. 85; *Sheboygan v. Sheboygan etc. R. R. Co.*, 21 Wis. 667. But it is sufficient that no wrong, injury, or damage is charged. By the extended jurisdiction of the court in equity, by chapter 190, Laws of 1882, amending section 3180 of the Revised Statutes, there must be some special injury, or necessity to protect the rights of some person, to grant an injunction. As a private nuisance, or a public nuisance by which some private person has suffered some special and peculiar injury, there must be material annoyance, inconvenience, discomfort, or hurt, and the violation of another's rights in an essential degree: Wood on Nuisances, 1, 3, 4. The law gives protection only against substantial injury, and the injury must be tangible, or the comfort, enjoyment, or use must be materially impaired: *Stadler v. Grieben*, 61 Wis. 500; *Pennoyer v. Allen*, 56 Wis. 502; 43 Am. Rep. 728, and many other cases in this court. It is a maxim of the law that wrong without damage or damage without wrong does not constitute a cause of private action.

It is charged that this building will be in violation of an ordinance of said city. That would not give a cause of action for an injunction, even if the ordinance so provided: *Waupun v. Moore*, 34 Wis. 450; 17 Am. Rep. 446.

The argument of the learned counsel of the respondents, and the authorities cited on the question whether the proposed

building will obstruct the navigation of the river, are impertinent to the case. There is nothing in the case that involves any such question in the remotest degree. Within any grounds or reasons known to the well-settled principles and practice of equity jurisprudence, the complaint states no case for an injunction, or for any other purpose. The action is not based on any statute which gives a right of action in such a case. But the learned counsel of the respondent cites chapter 423, Laws of 1887, in support of the action. This statute is, if possible, more marvelous than the complaint. The enactment of the statute was obviously obtained to create just such a right of action, and it is a little singular that it is not referred to in the complaint as the foundation of this action, as the action can stand on nothing else, and this statute most clearly sanctions it, excepting as to the city of Janesville as plaintiff. The first section is as follows: "It shall be unlawful and *presumptively* injurious and dangerous to persons and property to drive *piles*, build piers, cribs, or other structures, . . . in Rock River, *within the limits of the county of Rock*, and the doing of any such act *shall be enjoined* at the suit of any *resident taxpayer without proof that any injury or danger has been or will be caused by reason of such act.*" The Italics are not in the act, and are used to save comment. Section 2 is specially appropriate to this action, and is as follows: "The doing of any such act shall also be enjoined at the suit of any owner or lessee of the right to use water of said river to operate any mill or factory within said county, without proof of any further fact than that such act will cause the water of said river to rise or set back, to some extent, at the place where the water used to operate such mill or factory is discharged into said river." The complaint copies this last part as the only grievance of the plaintiff, the Janesville Cotton Mills. The last section is unimportant. It excepts the building of railway and highway bridges, and the repair and reconstruction of mill-dams across the river, and a pending suit of the Janesville Cotton Mills and others against Edwin F. Carpenter. probably of subject-matter the same as or similar to that of this action.

The learned counsel of the appellant contends that this act is unconstitutional, and therefore void. The legislature would have saved time and expense if it had issued the injunction in the case for which the act was made. This is the first time that any legislature of any enlightened country ever attempted

to create an action without any cause of action; to authorize a complaint to be made to a court when there is nothing to complain of; to compel the courts to enjoin the lawful use and enjoyment of one's own property "without proof that any injury or danger has been or will be caused by reason of such act"; to create a cause of action without wrong, injury, or damage; to authorize an action to be brought by a person without any interest in the subject-matter, or privity with the defendant of contract, estate, duty, obligation, or liability, if he is only a resident tax-payer, and to exclude all others who have any interest or privity in the subject-matter, and are presumptively injured in person or property; to make that act unlawful and actionable in one county, and as to one river, that is lawful in all other counties, and as to all other rivers, under precisely the same circumstances; or to adjudicate and decide the case, and then order and compel the court to execute its judgment by issuing an injunction. These are some of the strange and novel provisions of this statute.

That Thomas Lappin, the owner in fee of this ground, has the right to use and enjoy it to the center of the river, in any manner not injurious to others, and subject to the public right of navigation, has been too often decided by this court and other courts to be questioned. As a riparian owner of the land adjacent to the water, he owns the bed of the river *usque ad filum aquæ*, subject to the public easement, if it be navigable in fact, and with due regard to the rights of other riparian proprietors. He may construct docks, landing-places, piers, and wharves out to navigable waters, if the river is navigable in fact, and if it is not so navigable, he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes: *Jones v. Pettibone*, 2 Wis. 308; *Arnold v. Elmore*, 16 Wis. 509; *Yates v. Judd*, 18 Wis. 118; *Walker v. Shepardson*, 4 Wis. 486; 65 Am. Dec. 324; *Wisconsin R. Imp. Co. v. Lyons*, 30 Wis. 61; *Delaplaine v. Chicago etc. R'y Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; *Hazeltine v. Case*, 46 Wis. 391; 32 Am. Rep. 715. Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property, under the protection of the constitution, and it cannot be taken, or its value lessened or impaired, even for public use, "without compensation," or "without due pro-

cess of law," and it cannot be taken at all for any one's private use.

1. This statute makes it unlawful for the defendant, who owns this ground, and has the right to use it under said Lappin, to drive piles into it anywhere within the river for any purpose. It prevents the lawful use of his property. It takes it away from him without compensation or due process of law, and denies the defendant "the equal protection of the laws." It is therefore in direct violation of articles 5 and 14 of the amendments of the constitution of the United States, and of section 13 of article 1 of the state constitution, and is therefore void. It takes his property away from him, and leaves him no remedy whatever by which he can regain it or obtain redress. It is therefore in conflict with section 9 of article 1 of the state constitution, which "entitles him to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character." Any restriction or interruption of the common and necessary use of property that destroys its value, or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of the constitution: *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Wynehamer v. People*, 13 N. Y. 378; *People ex rel. Manhattan S. Inst. v. Otis*, 90 N. Y. 48; *Hutton v. Camden*, 39 N. J. L. 122; 23 Am. Rep. 203.

2. The legislature usurped the judicial power of the courts by the enactment of this statute. It adjudicates an act unlawful and presumptively injurious and dangerous which is not and cannot be made to be so without a violation of the constitutional rights of the defendant, and imperatively commands the court to enjoin it without proof that any injury or danger has been or will be caused by it. It reverses very many decisions of this court on the very questions involved in it, and which have the effect of a judicial determination of the defendant's rights of property. It violates section 2 of article 7 of the state constitution, which provides that the judicial power of the state, both as to matters of law and equity, shall be vested in the various courts. It takes away the jurisdiction of the courts to inquire into the facts and determine the necessity and propriety of granting or refusing an injunction in such a case, according to the established rules of a court of equity: *Ervine's Appeal*, 16 Pa. St. 256; 55 Am. Dec. 499. It is said in that case: "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to

the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than to any other attribute of government."

3. This statute is discriminating and class legislation, in violation of the spirit of our constitution, and contrary to the principles of civil liberty and natural justice. It gives to a certain class of citizens privileges and advantages which are denied to all others in the state under like circumstances, and subjects one class to losses, damages, suits, or actions from which all others under like circumstances are exempted: *Holden v. James*, 11 Mass. 396; 6 Am. Dec. 174. Its operation is restricted and partial to that part of Rock River within the county of Rock, while said river elsewhere, and all other rivers, are excluded. It gives the right of action to the resident tax-payers of said county, while all others are excluded from the exercise of such right, whatever interest they may have in the subject-matter of the action. It gives the right of action to the owners or lessees of the right to use the water of said river to operate any mill or factory within said county, and excludes all other owners or lessees of such water-powers by means of said river elsewhere. It gives to such favored classes the stupendous advantage and exceptional privilege of maintaining such actions without proof that any injury or danger has been or will be caused by reason of such act. It would be difficult, if not impossible, to crowd into so short a statute any more or greater violations of that principle, so essential to a free government, of "equal, general, and standing laws." For these reasons this statute is unconstitutional and void. It is not, perhaps, a violation of any special clause of the constitution in these respects, but it is a violation of its essential spirit, purpose, and intent, and contrary to public justice: *Bull v. Conroe*, 13 Wis. 233; *Durkee v. Janesville*, 28 Wis. 464; 9 Am. Rep. 500, and cases cited in the opinion.

In this connection I cannot forbear quoting the language of Mr. Justice Chase in *Calder v. Bull*, 3 Dall. 387, 388: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. . . . The nature and ends of the legislative power will limit the exercise of it. . . . There are certain vital principles in our free republican government which will determine and overrule an apparent and flagrant abuse of legislative power, — as to authorize manifest injustice

by positive law, or to take away that security of personal liberty or private property for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority." This language is quoted in the above case of *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500, but it will bear repeating here, as more apt and appropriate than in that case.

It has been suggested that this statute was procured for this case, and perhaps like cases in the city of Janesville, as if, when the courts deny an injunction, the legislature is made to intervene and enact that an injunction shall be granted, and that, too, without proof of injury or danger. It is hard to believe that any one would procure the passage of such an act or any act of the legislature to circumvent and overrule the courts in cases which have failed for want of any proof of injury. This act is sought to be sustained as a proper exercise of the police power of the state. The act itself makes no such claim, and has not the remotest reference to any such object or purpose. It is sufficient to say that such an objectionable statute cannot be sustained by the exercise of any power inherent in or conferred upon the legislature. The complaint states no cause of action, and therefore the circuit court ought to have sustained the motion to dissolve the injunction.

The order of the circuit court is reversed, and the cause remanded, with direction to dissolve the injunction, and for further proceedings.

INJUNCTION, WHEN PROPER REMEDY. — An injunction is not the proper remedy when the applicant has an adequate remedy at law: *Smith v. Good-knight*, 121 Ind. 312; *Keokuk etc. R'y Co. v. Donnell*, 77 Iowa, 221; *Moore v. Brooklyn City etc. R. R. Co.*, 108 N. Y. 98; *Duck v. Peeler*, 74 Tex. 268; *Mann v. Wallis*, 75 Tex. 611; *Hoye v. Sweetman*, 19 Nev. 376. Wrongs already committed cannot be corrected by injunction, for such remedy is merely preventive in its nature: *City of Alma v. Loehr*, 42 Kan. 368. An injunction is the proper remedy, where the applicant has good reason to apprehend that defendant is about to encroach upon his legal rights in such a manner as to cause him some irreparable and material injury: *Mechanics' Foundry v. Ryall*, 75 Cal. 601; *Heine v. Merrick*, 41 La. Ann. 194; *Kimberly etc. Co. v. Hewitt*, 75 Mich. 371; *Penn v. Ingles*, 82 Va. 65. An irreparable injury is one which cannot be compensated in pecuniary damages: *Hodge v. Giese*, 43 N. J. Eq. 342. A riparian owner cannot restrain, by injunction, a railroad company from building a retaining wall on the opposite side of a river, where it is not shown that the wall will interfere with the owner's riparian rights with reference to the flow of water: *Patterson's Appeal*, 129 Pa. St. 109; for

it is incumbent upon the applicant for an injunction always to show a contemplated invasion of his rights: *Smith v. Navasota*, 72 Tex. 422. Equity has jurisdiction to prevent or abate nuisances by injunction, when such nuisances materially injure a person or his property: *Wolcott v. Melick*, 11 N. J. Eq. 204; 66 Am. Dec. 790; note to *Ryan v. Copes*, 73 Am. Dec. 113-116.

NUISANCES, WHAT ARE. — **LEGISLATURES, MUNICIPAL CORPORATIONS, OR BOARDS OF HEALTH** cannot declare particular things nuisances which in reality are not: Note to *Hutton v. City of Camden*, 23 Am. Rep. 212, 213; *Ex parte O'Leary*, 65 Miss. 180; 7 Am. St. Rep. 640, and note; *Jackson v. Castle*, 82 Me. 579; *Pine City v. Munch*, 42 Minn. 342. In *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813, it was decided that the legislature has the power to enlarge the category of public nuisances by declaring places and property used to the detriment of public interests, or to the injury of the health, morals, or welfare of the community, to be nuisances, even though they are not such at common law.

RIPARIAN RIGHTS. — The title of a riparian owner of land along a river extends to the thread of the stream if it is non-navigable, and to the line of high water if it is navigable: *Welles v. Bailey*, 55 Conn. 292; 3 Am. St. Rep. 48. Riparian owners hold their lands subject to the right of the public to use the navigable rivers flowing through them as public highways: *Brooks v. Cedar Brook etc. Co.*, 82 Me. 17; 17 Am. St. Rep. 459. The right of the riparian owner to build and maintain a wharf out to the point in a stream which is practically navigable, or even beyond that point, provided it does not obstruct navigation, is a well-established right: *Bainbridge v. Sherlock*, 29 Ind. 364; 95 Am. Dec. 644; and this right cannot be taken away by the state without compensation: *Union Depot etc. Co. v. Brunswick*, 31 Minn. 297; 47 Am. Rep. 789. Compare also *Sherlock v. Bainbridge*, 41 Ind. 35; 13 Am. Rep. 302, and note. A riparian owner of land bounded by navigable waters is entitled to build wharves out to such a depth of water as will enable ships to load and unload; and he may use the shore in front of his land for any purpose whatever not inconsistent with the rights of the public: *Parker v. West Coast Pkg. Co.*, 17 Or. 510; *Ladies' Seamen's F. Soc. v. Halstead*, 58 Conn. 145; *The A. C. Conn. Co. v. Little Saumico etc. Co.*, 74 Wis. 652.

OATMAN v. BATAVIAN BANK.

[77 WISCONSIN, 501.]

SET-OFF, BANK'S RIGHT OF. — If debt owing to a bank by an insolvent is not due it cannot be set off against a debt due from the bank to him, and his assignee in insolvency may consequently sustain an action against the bank therefor.

Miller, Noyes, and Miller, and M. P. Wing, for the appellant.

Fruit and Brindley, for the respondent.

ORTON, J. On the second day of January, 1889, one Royal S. Reynolds, being insolvent, made a voluntary assignment of all his property to the respondent, for the benefit of his creditors. At that time he had on deposit in the appellant bank,

to his credit, the sum of \$773.13. At the same time the said bank held and owned the promissory note of said Reynolds for one thousand dollars, executed by him to one S. Martindale, and indorsed to said bank by said Martindale, on the third day of July, 1888, to become due twenty days after date, with interest at eight per cent per annum, and to bear ten per cent interest after due. The time of payment of said note had been extended from time to time by the said Reynolds paying the interest thereon in advance to such times; and finally, on the sixth day of December, 1888, the said Reynolds paid the interest thereon and the time of payment thereof was extended to the thirty-first day of January, 1889, so that at the date of said assignment said note was not yet due.

The respondent assignee demanded of the bank the payment of said deposit, and the bank refused, claiming, and still claims in this suit, that the note set off and canceled the deposit. Whether the said note had been so extended was a question of fact on the trial, but the jury found that it had been, and, as we think, on sufficient evidence. The bank held and owned other notes of the said Reynolds at the time the assignment was made, and they also had been extended beyond the date of the same, in the same manner of the said Martindale note, so that none of them were yet due. These other notes are not material, because the Martindale note is sufficient to cancel the said deposit, if it is allowed as a set-off thereto. The jury virtually found that none of the notes were due. The only remaining question, therefore, is one of law,—whether the Martindale note (or any of them), not being due at the date of the assignment, was a proper set-off against the amount of said deposit. The defendant requested the court to charge that it was, and the court instructed the jury that it was not, if it was not due at the date of the assignment.

The learned counsel of the appellant contends that by virtue of a bank's equitable lien upon the deposit of its customer as security for the payment of his indebtedness to the bank, and by virtue of an equitable set-off of one against the other in case of the customer's insolvency, a court of equity will decree such an application of what he owes to the bank, due or not due, although it might not be strictly a legal set-off. There is not only plausibility in this claim, but it seems to be sustained by some respectable authorities. This was never allowed at common law, but it seems to have long prevailed in

cases of bankruptcy, according to *Carr v. Hamilton*, 129 U. S. 255. It is difficult to see why a bank should have this exceptional advantage over an individual creditor. By our statute (R. S., sec. 4258), the set-off, in all cases, must be due, and it makes no exception in favor of banks, or on account of insolvency; and by our law of voluntary assignments, all creditors must be treated alike, and their rights are fixed at the date of the assignment: *Union Nat. Bank v. Hicks*, 67 Wis. 189. In *Armstrong v. Pratt*, 2 Wis. 299, the defendant sought to set off a debt which had not matured at the time of the death of the intestate against a claim the estate held against him as one of the assets of the estate. This was not allowed, for the reason that it would affect the equal distribution of the assets of the estate, and tend to the prejudice of the claims of other creditors. The same reasons would obtain in cases of voluntary assignment. If the estate, in that case, had been insolvent, then the distribution of the assets must have been *pro rata*, and equal to the creditors, for the same reason that the assets of an insolvent assignor must be so distributed. The cases are alike in principle. This is as near as this court has ever decided the question involved in this case.

There might be special equities growing out of the transaction itself, through fraud or matters of trust, that might make an exception in favor of a bank, but mere insolvency of the debtor is no ground for such an exception; and if the insolvent debtor has made an assignment for the benefit of his creditors, the reason is strong the other way. The learned counsel of the appellant cites 1 Morse on Banks and Banking, section 337, to the general doctrine that "for any indebtedness accruing from the customer the bank has the right of set-off," etc. In *Jordan v. National S. & L. Bank*, 74 N. Y. 467, 30 Am. Rep. 319, the court says that Mr. Morse has stated the rule too broadly, and that the bank has a lien on the funds of the depositor in its possession for the balance of the general account, if that balance is due and payable. The following authorities are cited in the brief of the learned counsel of the respondent as sustaining the rule that the demand claimed to be a set-off in such a case must have matured before the date of the assignment: *Bradley v. Angel*, 3 N. Y. 475; *Beckwith v. Union Bank*, 9 N. Y. 211; *Myers v. Davis*, 22 N. Y. 489; *Martin v. Kunzmüller*, 37 N. Y. 396; *Roberts v. Carter*, 38 N. Y. 107; *Jordan v. National S. & L. Bank*, 74 N. Y. 467; 30 Am. Rep. 319; *Newcomb v. Almy*, 96 N. Y. 308; *Richards v. La Tourette*,

119 N. Y. 54; *Fuller v. Steiglitz*, 27 Ohio St. 355; 22 Am. Rep. 312; *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69; Burrill on Assignments, sec. 403; Pomeroy on Remedies, 185-204. There are many cases in Michigan that hold this rule, unless some special equities other than that growing out of insolvency should make an exception. It is correctly claimed that this is the rule by a great preponderance of the authorities. The learned counsel of the appellant cites but few cases, and some of them hardly dispute this rule. The rule that places a bank under the law on equality with all other creditors, in such a case, seems to be reasonable. The circuit court ruled correctly, and the jury properly found for the plaintiff.

The judgment of the circuit court is affirmed.

BANKS AND BANKING. — For a discussion of the relation between a bank and its depositors, see note to *National Bank v. Smith*, 23 Am. Rep. 50, 51. As to the right of the bank to set off a debt due from a depositor against a debt due from the bank to him, see note to *Matter of Franklin Bank*, 19 Am. Dec. 420, 421. Compare *Continental Nat. Bank v. Weems*, 69 Tex. 489; 5 Am. St. Rep. 85; note to *Masonic Sav. Bank v. Bangs*, 4 Am. St. Rep. 202-204; *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350; 10 Am. St. Rep. 669.

CHANDOS v. MACK.

[77 WISCONSIN, 573.]

ISLANDS. — CONVEYANCE OF LAND ABUTTING ON A NAVIGABLE STREAM vests title in the grantee to the thread of the stream, including any islands which lie between the thread of the stream and the land so conveyed.

UNSURVEYED ISLANDS LYING BETWEEN THE CENTER OF A STREAM AND LANDS GRANTED by the government without any reservation vest in the grantee of such grant.

Silverthorn, Hurley, Ryan, and Jones, for the appellants.

Gardner and Gaynor, for the respondent.

COLE, C. J. There is no dispute about the facts in this case, but the counsel disagree as to the law arising upon those facts. The action is ejectment, brought by the plaintiff's intestate, who claimed to be the owner, as riparian proprietor, of an island in the Wisconsin River, a navigable stream. She held and owned, under various mesne conveyances, the title, derived from the general government, of lot 4 in section 8, and lot 3 in section 17, township 22, range 6 east, which lots lie on the main west bank of the river, opposite to the island in controversy. She claimed that she was entitled to the possession of

this island by virtue of the grant of the general government of lots 3 and 4 to those under whom she derived title, except as to certain rights which the defendants have under a deed that is mentioned in the evidence, but which does not affect any question in issue here.

The island lies near the west bank of the river, as we have said, opposite lots 3 and 4; is west of the main channel and west of the thread of the stream, and also west of the main navigable portion thereof. It is separated from the west bank of the river by a narrow channel or slough, which varies in width from 95 to 100 feet, and is separated from the east bank of the river by a channel which varies in width from 320 to 700 feet. The channel between the island and the west bank of the river has not been used since the settlement of the country for purposes of navigation, except to run out lumber manufactured at the mills on the mainland on the west bank. The portion of the river used for the purpose of navigation is the main channel, east of the island. The island is about 1,250 feet in length, and varies in width from 70 to 300 feet; it is a rocky formation, covered with a thin, sandy soil, and was originally covered with timber, which has been removed. It lies up and down the river, nearly parallel with the thread of the stream. It is not overflowed in ordinary freshets, but is substantially submerged in extraordinary floods. The island contains between two and three acres of land. When the general government, by its agent, surveyed and platted lots 3 and 4, and the lands on either side of the river opposite the island, it made no survey or plat of the island or of any part of it; nor has the government ever surveyed and platted it, although the location of the island is marked upon the government plat of the survey of the lands opposite and adjacent thereto. The government many years since disposed of all its lands on the river, opposite and adjacent to the island, and there is nothing which tends to show that the government intended to reserve the island as a part of the public domain. The island is referred to in the field-notes of the meandered line, but it was not surveyed, though its location is marked upon a plat of surveys, so the fact of its existence was not overlooked by the agents of the government when such surveys were made.

Now, the question in the case is, To whom does the island belong? Did it pass to the purchasers of lots 3 and 4 on the bank of the river opposite to it. The island lies between

these lots and the middle of the river, and there is nothing to show, as we have said, that the government intended to reserve any right or interest in the island. As there was no such reservation, the presumption is that the government did include it and pass all title to it to the purchaser.

On the part of the plaintiff it is insisted that the title did pass to the purchaser of lots 3 and 4 on the west bank of the river. The position of the learned counsel is this: He says when the general government, by its agents, surveys a section of land lying partly in a navigable stream, which embraces islands of various sizes in such stream, subdivides the entire section into such lots and subdivisions as it sees fit, and leaves some such islands unsurveyed, and places the same in market, and disposes of all said lots and subdivisions so surveyed and platted, that then it has parted with its entire interest in the section to the purchasers, who, as riparian proprietors, take, under their respective grants, to the middle of the stream; that under such circumstances the presumption is that the government intended to make no reservation, but intended that all its title should pass by its grant, as in case of a private conveyance. It seems to us there is great force of reason, and much good sense, in this view of the law. In this state the settled rule is, that a grant by an individual of land which is bounded on a navigable stream vests in the grantee the title in the bed of the river to the thread of the stream, subject to the public right of navigation. The cases in this court where this doctrine has been laid down are numerous, but are so familiar to the profession that it is unnecessary to cite them. The precise question, however, here presented — whether the title of an unsurveyed island between the shore and middle of the stream would pass to the purchaser — has not been directly decided; but we see no principle of law or good reason for holding that it would not so pass.

The inference certainly is very strong, when the government leaves a small island in a navigable river, lying between the shore and middle of the stream, unsurveyed, and sells all the surveyed islands and all the lands on both sides of the river, that it intends to abandon all right to such unsurveyed island, and let it pass to the riparian owners of lands on the river as an incident to its grant. It seems formerly to have been the policy of the government to survey islands omitted from the general survey, and sell them; but from a letter of the acting

commissioner of the general land-office, which was introduced on the trial, it appears that this practice has been abandoned because it was found disadvantageous to the public interest, and applications for such surveys are no longer entertained. This item of evidence gives additional strength to the inference as to the effect of the grant itself from the government, — that where no right is reserved, the grant of lands on the bank of the river vests in the purchaser the title of any unsurveyed islands lying between the mainland and the center of the stream, since the government no longer desires to assert any interest to an island thus situated, and omitted in the original survey.

"In the case of *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112, the supreme court of Illinois held that when a government grant is made which does not reserve a right or interest that would ordinarily pass by the rules of law, and the government does no act which indicates an intention to make such reservation, the grant includes all that would pass by it, if it were a private grant; and that as the United States had not imposed any limitation upon its grant of the land in question, which was an island in the Mississippi River, separated from the adjoining land by a slough, the title of the riparian owners extended to the thread of the river, and included the island": Gould on Waters, sec. 69. So "in *St. Paul etc. R. R. Co. v. Schurmeier*, 7 Wall. 272, the question was as to the title to an island in the Mississippi River, which, at the time of the survey, was a mere sand-bar, about 90 feet wide and 160 feet long, separated from the mainland by a slough or channel 28 feet wide. The island was submerged at high water (of which no notice was taken in making the survey), and the slough was insignificant in comparison with the main river. At the time of the action, the sand-bar had been filled in and covered with valuable improvements, and the contest was between the owner of the adjoining fraction, and a railroad company which claimed the bar under a new survey made by a United States surveyor, and a Congressional grant of certain odd-numbered sections. It was held that the sand-bar was included in the first survey as a part of the mainland": Gould on Waters, sec. 77. See same case, *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 82; 88 Am. Dec. 59.

It seems to us that the decision in the last case is decisive of the one before us. It is true, as observed by plaintiff's

counsel, there are facts in the case at bar much stronger in favor of the plaintiff than in the Schurmeier case. The general government had actually conveyed the island in controversy there, and attempted to grant it to the state of Minnesota for certain purposes, and the defendant claimed under the state. But in the case before us, there is no pretense that the government has ever surveyed or attempted to convey this island as a lot separate from the survey and conveyance of lots 3 and 4 on the adjacent main shore, or that it has ever claimed, or now claims, to be the owner of the island; nor is there any pretense that the patent of the general government, issued on the sale of those lands, reserved any right or interest that would ordinarily pass, by the rules of law, to the patentee, or that it did any act indicating an intention to make a reservation. The quantity of land included in the island was never ascertained, or attempted to be sold, and we think it must be deemed to have been included in lots 3 and 4, and to belong to the riparian owner of those lots.

This view renders it unnecessary to consider the question whether the plaintiff acquired any title from the state by virtue of the patents offered in evidence.

The judgment of the circuit court is affirmed.

GRANTS. — A grant of land bounded upon a navigable stream extends to the middle of such stream, unless the conveyance denotes an intention to stop short of that: *McCullough v. Wall*, 4 Rich. 68; 53 Am. Dec. 715. So where one holds land along a navigable river, and is entitled to the land the stream covers, by virtue of a grant from the state, a conveyance by such person, of a tract bounded by the river passes to the grantee the soil *ad medium filum aquæ*, as well as the land expressly granted: *Browne v. Kennedy*, 5 Har. & J. 195; 9 Am. Dec. 503. See also note to *Mather v. Chapman*, 16 Am. Rep. 55; *Fulmer v. Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88.

ROBERTS v. WISCONSIN TELEPHONE COMPANY.

[77 WISCONSIN, 589.]

TELEPHONE-POLES, LIABILITY FOR INJURIES RESULTING FROM. — One injured by his team, while frightened and running along a public highway, coming into collision with a telephone-pole which had been placed therein by authority of law, cannot recover of the telephone company therefor, where it appears that the poles were set in such highway with due care, and as near the side thereof as they could be placed without encroaching upon adjacent property.

Miller, Noyes, and Miller, for the appellant.

Lewis, Pfund, and Briggs, for the respondent.

COLE, C. J. This is an action for personal injuries. It appears, from the complaint, that the plaintiff was riding with another man in a buggy along the highway, which was almost perfectly level, and without any banks, borders, ditches, or rough or uneven places, or obstructions of any kind in it, except telephone-poles, which were set in the highway eleven rods apart, and about four or six feet south from the fence on the north side thereof. There were three traveled tracks about equally used by the public for traveling. The track on the north side of the highway was about eight feet from the fence on the north side of said highway, and about three feet from the telephone-poles. The team was traveling on this north track, and it is alleged the horses were gentle and tractable, and were under the control of the driver when they were stopped to enable the plaintiff to get out of the buggy. While in the act of alighting from the buggy, the horses were frightened by a team coming from behind, and ran along the highway, coming in collision with a telephone-pole, and the plaintiff was thrown forward from the buggy, in which he had regained his seat, and was endeavoring to stop the horses, and sustained the injuries of which he complains.

Now, does the complaint state a cause of action? It appears to us that it does not. The only act of negligence complained of on the part of the defendant is the placing of telephone-poles in the highway where they were set. These poles, as we have stated, were set from four to six feet from the fence on the north side of the highway, which would leave just room enough to permit the cross-arms on the poles to be entirely over the highway. Was it lawful to place these poles in the highway? The statute authorizes any corporation formed to build and operate telegraph lines, or conduct the business of telegraphing, to construct and maintain its lines, with all necessary appurtenances, along a public highway: *Sanborn and Berryman's Ann. Stats.*, sec. 1778. And in *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32, it was held that the statute included telephone companies, although such companies were not specifically mentioned therein. The poles then were not unlawful structures in the highway, but were authorized by law to be set therein. It is true, the statute, in effect, declares that no telephone line or any appurtenance thereto shall at any time obstruct or incommode the public use of the highway. Assuming the facts as to the location of

the telephone-poles to be as alleged in the complaint, we think they did not show any actionable negligence. They would certainly constitute no obstruction to the use of the highway, nor would the team have collided with them if it had been under the control of the driver and properly managed. It was the fright and unmanageableness of the horses which was the real cause of the accident. If the horses had not run against the pole they probably would have run into the fence, and caused an injury to life or property. For, as observed by the defendant's counsel, it is impossible to so arrange the surface of a highway that it will be safe for a runaway team to speed upon it. And this court has said that "it is not the duty of towns to provide roads which shall be safe for runaway or unmanageable horses, or such as have escaped from the control of their drivers without the fault of the towns; and where injuries are sustained under such circumstances, it appearing that otherwise they might not have been sustained, the loss must fall upon the owners whose misfortune, if not whose fault, it is that they so happened": *Jackson v. Bellevue*, 30 Wis. 250, 258. It is stated in the complaint that the highway where this accident occurred was almost perfectly level, with no ditches or rough or uneven places in it, there being nothing within the entire width to prevent a team from passing over it in safety, except the telephone-poles set near the fence. These poles could not have been placed nearer the fence without encroaching upon the adjoining property. They seem to have been set with due care, and it is plain that they did not and could not have obstructed or incommoded the public use of the highway. We feel constrained to so hold, upon the facts alleged.

The plaintiff's counsel suggests that the question whether the telephone-poles incommoded the public use of the highway was one for a jury to determine. That certainly is not the correct view, where a question of law is raised by demurrer. It is for the court then to decide whether, the facts being admitted, a cause of action is stated. Of course the defendant confessed the facts to be as alleged, but denies that by the law arising on the facts the plaintiff should recover any damages. So here the court must say whether the defendant, by setting its telephone-post in the place and manner described, was negligent, or was guilty of a breach of legal duty. We are clearly of the opinion that no actionable negligence is shown. The team could have passed along the high-

way in safety if the horses had not taken fright at the team coming from behind, and become unmanageable. That the horses ran against or struck the telephone-pole was the fault or misfortune of the driver. The demurrer to the complaint should have been sustained.

The order overruling the demurrer is reversed, and the cause is remanded to the circuit court for further proceedings according to law.

TELEPHONES — NEGLIGENCE. — The location and maintenance of telephone-poles, when authorized by law, should be in such a way as not to needlessly incommode the public, and for negligence in this respect, from which a person in the use of the highway is injured, the company must respond in damages: Note to *Central U. Tel. Co. v. Falley*, 10 Am. St. Rep. 131.

JOHNSON v. BORSON.

[77 WISCONSIN, 593.]

WHERE A WAY OF NECESSITY IS OBSTRUCTED by one across whose land it runs, the person entitled to such way may cross such lands at some other convenient place in order to reach the highway.

PRIVATE WAY, RIGHT TO MAINTAIN BARS ACROSS. — While one over whose lands another has a private way may lawfully maintain a reasonable bar-way at the end of such way, he has no right to maintain any unreasonable obstruction across the way, and whether a bar-way actually maintained is reasonable or not is a question for the jury.

ACTION of trespass for entering upon plaintiff's lands, tearing down his fences, and thereby causing his live-stock to go upon the land and to destroy the grass and herbage thereon.

Luse and Wait, for the appellant.

Richmond and Smith, for the respondent.

TAYLOR, J. This action was commenced in the municipal court of Dane County, to recover damages for an alleged trespass upon the lands of the plaintiff, and for throwing down the bars and fences thereon, by reason whereof the plaintiff's domestic animals escaped from his inclosure and trod down and destroyed the crops growing and being thereon.

The defendant answered that at the time and place mentioned in the complaint the defendant had a right of way over the lands described in the complaint, when and where the alleged trespasses were committed; and that the plaintiff, disregarding the right of the defendant to pass along said right

of way, "unlawfully obstructed said way by placing therein, at a point about midway between the termini thereof, a bar-way, with large and heavy bars, so large and heavy as to make it unreasonable to require this defendant, and those going over said way to and from his said premises, to take them down and replace them; and that this defendant had no other way of ingress or egress to and from his said land from the highway or any public road; and that in the exercise of his lawful right he took down and removed said bars, doing no unnecessary damage to the plaintiff."

By an amended answer the defendant alleged "that prior to 1886 he (this defendant) was the owner of the premises described in the complaint, also the lands which he still owns, lying north and west of said fourteen-acre tract; that such other lands lying west and north are wholly shut out from the highways, and the only way of getting in and out to the highway was over said fourteen-acre tract; that this defendant conveyed said premises, the fourteen-acre tract described in the plaintiff's complaint, to one John Peterson, the plaintiff's grantor, retaining the lands to the north and the west, as aforesaid, and still owns and occupies the same, and they are still shut out from all public highways, as aforesaid; that the defendant thereby reserved and retained a right to pass and repass over said fourteen-acre tract to the highway, as of necessity; and that the plaintiff wrongfully obstructed his said right of way; and that this defendant only removed such obstructions, doing no damage."

The case was tried by a jury in the municipal court, and they returned a verdict in favor of the defendant upon all the evidence in the case. The plaintiff appealed from the judgment of the municipal court to the circuit court of Dane County, but made no affidavit so as to entitle himself to a new trial of the whole case in the circuit court. The testimony in the municipal court was taken by a short-hand reporter, and the entire testimony on the trial in the municipal court was certified and returned, with the pleadings and other proceedings, to the circuit court, and the learned judge of the circuit court tried the case upon the evidence so taken on the trial in the municipal court.

Upon the trial in the circuit court, the learned circuit judge made and filed his findings of fact and conclusions of law as follows:—

"I find the following facts: 1. I find plaintiff and defend-

ant owners of respective premises, as stated and alleged in the pleadings; 2. That the fourteen-acre piece of land described in the pleadings adjoins the public highway, and lies between it and the land owned and occupied by the defendant, and that the defendant owned said fourteen-acre piece of land, together with the land now occupied by him, prior to the sale by him of said fourteen-acre piece of land to the plaintiff's grantor; 3. That said lands of the defendant are adjacent to no public highways, and defendant has not now, nor has he had since he sold said fourteen-acre piece, any way by which to reach a public highway except by crossing said fourteen-acre piece; 4. That by reason of the foregoing the defendant has a right of way by necessity over a portion of plaintiff's premises, that is, over said fourteen-acre piece to the highway; 5. That plaintiff erected and maintained the bars in controversy on the line between the said fourteen-acre piece of land and a 'flat-iron' shaped piece of land never owned by said defendant or his grantors, which lies adjoining said fourteen-acre piece on the east, and is included in the lands owned by the plaintiff; 6. That the bars were used in connection with a fence on plaintiff's land, and that such use of the premises was a reasonable and proper use, and that they were not an unreasonable obstruction to defendant's use of right of way; 7. That the bars erected and maintained by plaintiff in this case are so located and constructed as to be reasonable and proper in such location and construction, in view of the purpose for which the premises are used by the plaintiff, and the use of the right of way by the defendant; 8. That defendant has repeatedly neglected to replace the bars when he removed the same or caused the same to be removed, to the damage of the plaintiff; 9. That across said 'flat-iron' shaped piece of land, on the east of the fourteen-acre piece, the defendant has no right of way, except as plaintiff has given defendant license to travel there, or when, by mutual agreement, defendant's passage to the highway, across the fourteen-acre piece, has been fenced up; 10. That plaintiff has at various times in previous years, as the proper use of his land demanded it, maintained bars at the same place where they now are, and defendant kept up such bars, as he had occasion to use his right of way, when required to do so by plaintiff.

"From the foregoing I find, as conclusions of law,—1. That it was the duty of the defendant to keep up and replace said bars as erected and maintained by plaintiff; 2. That the

plaintiff has suffered damage by the refusal of the defendant to so keep up said bars; 3. That the verdict and judgment of the municipal court were not warranted by the law and the evidence; and 4. That the plaintiff is entitled to judgment in this court, reversing and setting aside the judgment of said municipal court, with costs, as provided by law. Let judgment enter accordingly.

“ROBERT G. SIEBECKER, Judge.”

The defendant excepted to the sixth, seventh, ninth, and tenth findings of fact, and to the first, second, third, and fourth conclusions of law. The circuit court entered judgment for the plaintiff, reversing the judgment of the municipal court, with costs in favor of the plaintiff, and the defendant appeals to this court.

The only errors alleged by the counsel for the appellant for the reversal of the judgment of the circuit court are: “1. The court erred in holding that the erection of the bars in question was a reasonable and proper use of the plaintiff’s premises, and not an unlawful obstruction to the defendant’s right of way. 2. The court erred in holding that it was the duty of the defendant to keep up and replace such bars. 3. The court erred in holding that the verdict and judgment of the municipal court were not warranted by the law and the evidence.”

The finding by the circuit court that the defendant had a right of way by necessity over plaintiff’s fourteen-acre piece to the highway must be taken as established by the evidence in the case, as neither party has excepted to such finding of fact. For the purposes of this appeal, that must be taken as a verity.

The ninth finding of fact, in view of the undisputed evidence in the case, also establishes the fact that at the time of the alleged trespass the defendant had a right of way across the triangular piece of land lying between the fourteen-acre piece and the highway, as the evidence clearly shows that the plaintiff had fenced the fourteen acres from the highway, except at the point where the bar-way led from said fourteen-acre tract across the triangular piece to the highway. The plaintiff having obstructed the defendant’s way of necessity to the highway, across the east side of said fourteen-acre tract, south to the highway, he might of right cross the plaintiff’s land at some convenient place to reach such highway. This proposition is sustained by the following decisions in

this court: *Jarstadt v. Smith*, 51 Wis. 96, 98, and cases cited in the opinion in that case. See also *Dillman v. Hoffman*, 38 Wis. 559.

It having been established that the defendant had a right of way over the place where the bar-way was placed by the plaintiff, the only other material questions in the case are as to the right of the plaintiff to maintain a bar-way at that place, and if he had that right, then whether the bar-way was a reasonable one under all the evidence in the case. Under the evidence in the case, we think the maintaining by the plaintiff of a gate or bar way at the place in controversy would not be an unwarrantable obstruction of the way, as the evidence shows that the bar-way was practically at the end of the private way. The evidence seems to show that the land between the bar-way and the highway was uninclosed, and so the protection of the plaintiff's inclosed land would justify a gate or bars at the place mentioned.

The only other question is, Was this bar-way a reasonable, or was it an unreasonable, obstruction of the defendant's right of way? It will be seen that the defendant, as a justification for leaving the said bars open when he passed through the same, claims that they were unreasonably heavy, and consequently the obstruction of the way was an unreasonable obstruction. We must presume that this question of the reasonableness of the bar-way was a question litigated in the municipal court; and an examination of the evidence taken on the trial in that court shows very clearly that the question of the reasonableness of the obstruction was contested on such trial. The jury in the municipal court, having found a verdict for the defendant, must have found that the obstruction was an unreasonable one. They must have found, as the circuit court did, that the *locus in quo* was the private way of the defendant; and if the law be, as it is claimed by the plaintiff to be, that in the absence of any express agreement on the subject the owner of the soil may place such reasonable gate or bars across such right of way as is fairly necessary to protect the crops and cultivated lands of such owner, then the jury must also have found the bars in question were an unreasonable obstruction. That the reasonableness or unreasonableness of the obstruction is a question of fact for the jury in almost all cases cannot be controverted: See *Bakeman v. Talbot*, 31 N. Y. 366; 88 Am. Dec. 275; *Baker v. Frick*, 45 Md. 343; 24 Am. Rep. 506; *Huson v. Young*, 4 Lans. 63; *Brill v. Brill*,

108 N. Y. 511; *Whaley v. Jarrett*, 69 Wis. 613; 2 Am. St. Rep. 764; Washburn on Easements, 256.

The jury having found for the defendant upon this question, their verdict on that question must stand, unless it is clearly unsupported by the evidence. That there is sufficient evidence to support their finding that the bars were an unreasonable obstruction can hardly be controverted. Under the rule established by this court as to the power of the circuit court to reverse the judgment of a justice's court upon questions of fact, it seems to us very clear that the learned circuit judge erred in reversing the judgment of the municipal court upon that question: See *Stebbins v. Killeen*, 68 Wis. 682; *Campbell v. Babbitts*, 53 Wis. 276. The jurisdiction of the municipal court in the trial of civil actions is the same as that of a justice's court, except that it may try cases where title to real estate comes in question. There certainly was sufficient evidence to sustain the verdict of the jury, and that is sufficient to make their finding binding upon the circuit court, upon appeal. We are clearly of the opinion that the circuit court erred in reversing the judgment of the municipal court upon the reasonableness of the obstruction placed in the right of way by the plaintiff.

The judgment of the circuit court is reversed, and the cause is remanded, with directions to that court to affirm the judgment of the municipal court.

PRIVATE WAYS — RIGHT TO MAINTAIN GATES AND BARS. — The owner of the fee may maintain a gate or bars at the place where a private way intersects the public road: *Phillips v. Dressler*, 122 Ind. 414; 17 Am. St. Rep. 375, and note; note to *Welch v. Wilcox*, 100 Am. Dec. 117, 118; *Short v. Devine*, 146 Mass. 119. Where the grantor obstructs a way of necessity, the grantee may go over other parts of the land of the grantor: Note to *Pettingill v. Porter*, 85 Am. Dec. 679.

SHEANON v. PACIFIC MUTUAL LIFE INSURANCE CO.

[77 WISCONSIN, 618.]

ACCIDENT INSURANCE — LOSS OF FEET, WHAT IS. — One being shot in the back, whereby his spine was penetrated, total paralysis of the lower part of his body produced, and the use of both feet destroyed, is entitled to recover under a policy of insurance agreeing to pay him a specified sum if, from a violent and accidental injury, externally visible, he suffers the loss of two entire hands or two entire feet, or one entire hand or foot. It is not necessary, to sustain a recovery, that he should prove that he suffered the severance from his body of his legs or feet. It is sufficient that he has lost their use as members of his body, so that they will perform no function whatever.

Ogden and Hunter, for the appellant.

H. W. Chynoweth, for the respondent.

COLE, C. J. It is almost superfluous to say that the construction of a policy of life or accident insurance is governed by the same rules as those which are applicable to the construction of other written contracts; that is, they should be construed according to the sense and meaning of the language used, in order to carry out the intention of the parties to the contract, when ascertained. And it is doubtless true that in arriving at the intention of the parties the language is to be understood in its ordinary and popular sense, unless it appears that it was used in some special or peculiar sense. There can be no disagreement as to the application of these cardinal and familiar rules in the construction of such contracts as the one before us.

Now, in view of these rules, what conclusion must be reached upon the facts stated in the complaint? It appears that the plaintiff was shot in the back, during the life of the policy, while he was attempting to escape from a saloon quarrel commenced by other parties, and the ball penetrated his spine, and produced an immediate and total paralysis of the lower part of his body, and entirely destroyed the use of both feet. The quarrel in the saloon arose suddenly, and was carried on without any participation therein by the plaintiff, and without his fault. He happened to be in the saloon when it occurred, and seems to have used due caution for his personal safety and protection; but he was shot in the back, probably accidentally, by one of the parties engaged in the quarrel. The question is, Does the policy cover such an injury? The policy covers both death and indemnity, the company agreeing to pay the principal sum, if the insured, from a violent and accidental injury, which should be externally visible, should "suffer the loss of the entire sight of both eyes, or the loss of two entire hands or two entire feet, or one entire hand and one entire foot." This is the language of the policy, and the question is, What does it mean, or what must be understood by it? Is its meaning that the insured is not entitled to recover the insurance money unless his legs and feet have been amputated or severed from his body? or does it mean that the injury must have destroyed the entire use of his legs and feet, so that they will perform no function whatever?

The contention of the learned counsel for the defendant is, that the clause is to be understood in the former sense, and

implies an amputation, or physical severance of the feet from the body, and does not include an injury such as paralysis, though such injury actually deprives the insured of all use of his feet and legs. We cannot adopt such a construction of the contract. To our minds, the loss of the hands and feet, embraced in the policy, is an actual and entire loss of their use as members of the body; and if their use is actually destroyed, so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb, we say he has lost it. This is the ordinary sense attached to the word when used in such a connection. Now, if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. The expression "loss of feet" would generally be understood to mean a loss of the use of these members; and if the lower portions of the plaintiff's body, and his feet, are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered "a loss of two entire feet," within the meaning of the policy. This is the proper construction of the words of the contract. It is a forced and unnatural construction of the language as here used to hold that it means an actual amputation of these limbs, and does not embrace and include an entire deprivation of their use as members of the body. It is not necessary to go into any recondite or elaborate discussion of the language of the policy, but only to give it its ordinary and popular sense. And understanding it in that sense, we are very clear that the complaint states a cause of action, and that the demurrer was properly overruled.

The order of the circuit court is affirmed, and the cause remanded for further proceedings.

ACCIDENT INSURANCE. — For the meaning of the words "totally disabled from the prosecution of his usual employment," as found in a policy for accident insurance, see note to *North American L. & A. Ins. Co. v. Burroughs*, 8 Am. Rep. 218, 219.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

TOWN OF ARKADELPHIA *v.* CLARK.

[52 ARKANSAS, 23.]

MUNICIPAL CORPORATIONS — ORDINANCE DECLARING WHAT IS NUISANCE. —

Neither the keeping, owning, or raising of bees within the limits of a city is, in itself, a nuisance, and an ordinance which declares it to be so, without regard to the fact whether it is so or not, is void. Whether or not such act constitutes a nuisance must be judicially determined in each case.

APPEAL from the circuit court. Clark was fined six dollars by the mayor's court for violating the ordinance in question. He appealed to the circuit court, on the ground that the ordinance was void, and that the court had no jurisdiction to render the judgment appealed from. The court sustained the appeal, and dismissed the charge, and the city appealed from that judgment. The ordinance provided as follows: "Be it ordained by the city council of the city of Arkadelphia that it shall be unlawful for any person or persons to own, keep, or raise bees in the city of Arkadelphia, the same having been declared a nuisance. . . . That any person or persons keeping or owning bees in the city of Arkadelphia are hereby notified to remove the same from the corporate limits of the city of Arkadelphia within thirty days from the date hereof."

Crawford and Crawford, for the appellant.

C. V. Murray and S. W. Williams, for the appellee.

Per CURIAM. Neither the keeping, owning, or raising of bees is, in itself, a nuisance. Bees may become a nuisance in

a city, but whether they are so or not is a question to be judicially determined in each case. The ordinance under consideration undertakes to make each of the acts named a nuisance, without regard to the fact whether it is so or not, or whether bees in general have become a nuisance in the city. It is therefore too broad, and is invalid.

Affirmed.

NUISANCES — MUNICIPAL CORPORATIONS. — A municipality cannot make that a nuisance which is not such in fact: *Ex parte O'Leary*, 65 Miss. 180; 7 Am. St. Rep. 640, and note. See also *Janesville v. Carpenter*, 77 Wis. 288; *ante*, p. 123, and note; compare *Easton etc. R'y Co. v. City of Easton*, 133 Pa. St. 505; 19 Am. St. Rep. 658, and note.

RAILWAY v. BARGER.

[52 ARKANSAS, 78.]

PRINCIPAL AND AGENT — DECLARATION OF AGENT AS EVIDENCE AGAINST

PRINCIPAL. — In an action to recover damages from a railroad company, for an injury sustained by falling into a hole in the company's depot platform, a statement made by its depot agent at the time of the accident, that the "hole ought to have been fixed," is inadmissible to show unreasonable delay on the part of the company in repairing the platform, after the defect became known.

ACTION against the railroad company to recover for personal injuries received through the alleged negligence of the company in failing to keep its depot platform in repair. The plaintiff was, at the time of the accident, assisting the owner to remove some heavy freight from the platform, and while walking backwards, fell into a hole therein, the freight falling on top of him. The company's depot agent was also assisting in removing the freight, and after the accident, stated that "that hole ought to have been fixed." This declaration was given in evidence, against the objection of the defendant company. The court then instructed the jury that if the agent in charge of the platform knew of the defect therein, that was equivalent to knowledge by the defendant company. Judgment for plaintiff, and defendant appealed.

John O'Day, E. D. Kenna, and B. R. Davidson, for the appellant.

L. Gregg, for the appellee.

Per CURIAM. The admission of the statement made by Frost was error. The only object of the testimony was to prove unreasonable delay upon the part of the company in repairing the platform, after the defect in it became known. The statement of the agent was incompetent for that purpose: Story on Agency, sec. 136; *Chicago etc. R'y Co. v. Fillmore*, 57 Ill. 265; *Chicago etc. R. R. Co. v. Riddle*, 60 Ill. 534; *Flynn v. State*, 43 Ark. 289.

Reverse the judgment, and remand the cause for a new trial.

AGENCY — DECLARATIONS OF AGENT AS EVIDENCE AGAINST PRINCIPAL. — Statements and representations of an agent are admissible against the principal only when the agent is acting for the principal and within the scope of his authority, the statements then being considered as part of the *res gestæ*: *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339; 98 Am. Dec. 229, and note; *Keeley v. Boston etc. R. R. Co.*, 67 Me. 163; 24 Am. Rep. 19; *Empire Mill Co. v. Lovell*, 77 Iowa, 100; 14 Am. St. Rep. 272; *Railway Co. v. Sistrunk*, 85 Ala. 352; *Ayers v. Hubbard*, 71 Mich. 594; *Doyle v. St. Paul etc. R'y Co.*, 42 Minn. 79; *Bernheim v. Hahn*, 65 Miss. 459; *Dodge v. Childs*, 38 Kan. 526; *Hargrove v. John*, 120 Ind. 285. In *Baltimore etc. Ass'n v. Post*, 122 Pa. St. 579, 9 Am. St. Rep. 147, it was decided that the loose declarations of a paymaster are not binding upon a railroad company.

BIRDSONG v. TUTTLE.

[52 ARKANSAS, 91.]

EXEMPTIONS. — One who is temporarily residing in another state, but who has a domicile within the state of Arkansas, may claim his exemption of personal property from sale under process as provided by the constitution of that state.

EXEMPTION — CONSTITUTIONAL LAW. — A statute exempting from execution the defendant's wages, with limitations as to time and amount, is valid, if the amount of the exemption does not exceed the amount of personal property exempted by the constitution.

ACTION for house rent. The house was situated in Texas, and defendant was, at the time of commencement of suit, and had been for a year previous thereto, occupying it, with his family, as tenant of the plaintiff. Defendant claimed to be a citizen of and voter in Arkansas. Section 1 of article 9 of the constitution of that state provides "that the personal property of any resident of this state" not exceeding in value a sum specified "shall be exempt from seizure on attachment, or sale on execution." A statute passed subsequently (act of November 27, 1875, Mansfield's Digest, section 3422) provided that "the time wages of all laborers and mechanics, not exceeding

their wages for sixty days, shall hereafter be exempt from seizure by garnishment or other legal process; provided that the defendant in any case shall file with the court from which such process shall issue a sworn statement that said sixty days' wages claimed to be exempt is less than the amount exempt to him under the constitution of the state, and that he does not own sufficient other personal property which, together with the said sixty days' wages, would exceed in amount the limits of said constitutional exemption." A railroad company was summoned as garnishee in the action, and answered that at the time that the writ was served it was indebted to defendant in the sum of \$79.05. The court decided that defendant was a resident of the state; that the indebtedness of the garnishee was for current wages during the months of April and May, and that the same was exempt from garnishment. Plaintiff appealed.

The appellant *pro se*.

Scott and Jones, for the appellee.

PER CURIAM. A person temporarily residing in another state, who has a domicile in this state, may claim his exemption of personal property from sale under process, under section 1 of article 9 of the constitution of 1874.

The provision is remedial, and should be liberally construed: *St. L., I. M., & S. R'y Co. v. Hart*, 38 Ark. 112. The word "resident" should be accepted in its broader sense.

The act of November 27, 1875, gives no right not granted by this clause, and is constitutional: *Winter & Co. v. Simpson*, 42 Ark. 410.

The judgment is affirmed.

EXEMPTIONS. — Statutes exempting property from execution are to be liberally construed, with a view to promoting the intent of the legislature: *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550; 16 Am. St. Rep. 855, and note. One who has his domicile in one state, but resides in another, may claim exemptions in the state of his domicile: *Note to Prater v. Prater*, 10 Am. St. Rep. 629.

BOGAN v. CLEVELAND.

[52 ARKANSAS, 101.]

FRAUDULENT CONVEYANCE OF HOMESTEAD, WHAT IS NOT. — A conveyance by a debtor of his homestead, not subject to a judgment lien or sale under execution is not fraudulent as to his creditors, though executed with a bad motive.

A. M. Wilson, for the appellant.

C. R. Buckner, Sam H. West, and B. R. Davidson, for the appellees.

Per CURIAM. The appellees, judgment creditors of one Bryant, brought this suit, seeking to cancel, for fraud, a conveyance of land from him to the appellant. The land constituted the homestead of the debtor when the conveyance was made. It was not subject to the lien of a judgment or to sale under execution. Creditors could not be injured by the conveyance. The debtor may have executed the conveyance with a bad motive, but it deprived his creditors of no right, and was therefore not fraudulent: *Bump on Fraudulent Conveyances*, 245; *Wait on Fraudulent Conveyances*, sec. 71; *Car-mack v. Lovett*, 44 Ark. 180.

The judgment is reversed, and cause remanded, with instructions to dismiss the bill.

FRAUDULENT CONVEYANCE — HOMESTEAD. — A debtor's conveyance of his homestead, which is not subject to execution and sale by his creditors, is not fraudulent: *McDannell v. Ragsdale*, 71 Tex. 23; 10 Am. St. Rep. 729; *Butler v. Nelson*, 72 Iowa, 732; *Derr v. Wilson*, 84 Ky. 14; *Lacy v. Rollins*, 74 Tex. 566; although made with intent to defraud his creditors: *Dortch v. Benton*, 98 N. C. 190; 2 Am. St. Rep. 331. For fraudulent acts of one entitled to a homestead cannot divest him of that right: *Gruhn v. Richardson*, 128 Ill. 178.

WILLIAMS v. RENWICK.

[52 ARKANSAS, 160.]

JUDGMENT OF SISTER STATE, ACTION ON. — In an action on a foreign judgment, an answer which does not allege want of jurisdiction of the person or subject-matter of the controversy, but alleges simply that the judgment was rendered without jurisdiction, because rendered upon a complaint which, upon its face, disclosed no cause of action, is insufficient, and subject to demurrer.

ACTION upon a judgment obtained in the state of South Carolina. The answer alleged that the court of that state

which rendered the judgment sued on had no jurisdiction to render it, because the complaint in that case disclosed upon its face that the plaintiff therein had no cause of action, and that the court had no jurisdiction to render that or any other judgment in said case, and that it was therefore void. A demurrer to the answer was sustained, judgment for plaintiff on his said judgment rendered, and defendant appealed.

Dan W. Jones, for the appellant.

J. C. Head, for the appellee.

PER CURIAM. The answer did not allege want of jurisdiction of the person or subject-matter of the controversy, but only error in the exercise of jurisdiction, if error at all. We cannot inquire into that subject. The demurrer was rightly sustained.

Affirmed.

JUDGMENTS OF SISTER STATES, CONCLUSIVENESS OF. — As to the validity, effect, and conclusiveness of judgments of courts of sister states, see note to *Hood v. State*, 26 Am. Rep. 27-33; note to *Bartlett v. Knight*, 2 Am. Dec. 42-45. Judgments of sister states may be impeached for want of jurisdiction over the person or the subject-matter: *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447. Judgments of sister states can be given no greater effect in another state than belongs thereto in the state where they were rendered: *Van Cleaf v. Burns*, 118 N. Y. 549; 16 Am. St. Rep. 782, and note.

MEMPHIS AND LITTLE ROCK R. R. Co. v. KERR.

[52 ARKANSAS, 162.]

RAILROADS — DUTY TO STOCK ON TRACK. — The duty which a railroad company owes to the owner of stray stock upon its track is, that the engineer in charge of the train at the time shall use ordinary or reasonable care, after the stock is discovered by him, to prevent injury to it. It is not negligence for a railroad company to fail to keep a lookout for stock.

U. M. and G. B. Rose, for the appellant.

J. S. Thomas, for the appellee.

HUGHES, J. This is an action to recover damages for the killing of a mule by the appellant's engine.

The evidence for appellee tended to show that the mule was grazing upon the railroad track, and when the train approached within about one hundred and fifty feet of it, it ran down the track about seventy-five yards, and was struck by the engine,

and killed; that before it was struck the whistle was sounded several times, but that the speed of the train was not checked.

The evidence for the appellant tended to show that the engineer first saw the mule when it came on the track, about one hundred and fifty feet ahead of the engine; that the engineer, upon first seeing it, sounded the whistle and called for brakes, and that he was unable to check the train after he first saw it, so as to prevent the engine from striking the mule; that he was keeping a close lookout at the time.

Verdict was given for plaintiff; a motion for new trial was overruled, and the railroad company excepted and appealed.

The court, by modifications of the instructions asked for by the appellant, charged the jury, in effect, that if the proof showed that the servants of the company in charge of the train at the time were negligent in keeping a careful lookout, the company was liable. In *L. R. & Ft. S. R'y Co. v. Holland*, 40 Ark. 336, this court, by Judge Smith, said: "Ordinary care in the management of their trains is the measure of vigilance which the law exacts of railroad companies to avoid injury to domestic animals, and this means practically that the company's servants are to use all reasonable efforts to avoid harming an animal, after it is discovered, or might by proper watchfulness be discovered, on or near the track."

If the intimation, *supra*, that a railroad company is liable if the engineer in charge of the train when stock is injured "might, by proper watchfulness," discover the animal on or near the railroad track in time to avoid injuring it, means that a railroad company owes to the owner of stock that stray upon its track a duty to keep a lookout to prevent injuring it, it states the rule too broadly.

In *Kansas City etc. R'y Co. v. Kirksey*, 48 Ark. 366, it is held that a railroad company owes no duty to the owner of stock which has strayed upon its track, except to use ordinary or reasonable care, at the time, to avoid injury to it, and that the engineer is not bound to keep a lookout over the entire right of way and to apprehend danger when an animal is discovered upon it.

The question as to the duty of an engineer to keep a lookout for stock upon the track did not arise in the case.

Each case should be determined upon its peculiar circumstances.

The extent of the duty which a railroad company owes to the owner of stock upon its track is, that the engineer in charge

of the train at the time shall use ordinary or reasonable care, after the stock is discovered by him, to prevent injury to it, and this negatives the idea that the engineer is bound to keep a lookout for stock.

Several states, among them Tennessee and Alabama, have by acts of their legislatures altered the rule by making it the duty of the engineer to keep a lookout for stock.

There is an obligation due to others from railroad companies to preserve a strict lookout while running their trains, and as the agents of the company, in the absence of circumstances leading to a different conclusion, are presumed to keep such lookout, it is a fair inference of fact for the jury that a watchful agent will see stock on or near the track, and they will then determine whether he has used ordinary or reasonable care to prevent injury to it.

It is error for the court to instruct a jury that it is negligence for a railroad company to fail to keep a lookout for stock.

Reverse, and remand.

RAILROAD COMPANIES, DUTY OF, TO CATTLE ON THE TRACK. — When an animal is wrongfully upon a railroad track, the men in charge of an approaching train are not obliged to look ahead and ascertain whether the animal is there: *St. Louis etc. R. R. Co. v. Linder*, 39 Ill. 433; 89 Am. Dec. 319; *New Orleans etc. R. R. Co. v. Bourgeois*, 66 Miss. 3; 14 Am. St. Rep. 534, and note; but when an animal is actually seen upon the track, or likely to immediately go thereon, every care must be used by the company's employees to avoid killing it: *Chicago etc. R. R. Co. v. Kellam*, 92 Ill. 245; 34 Am. Rep. 128; *New Orleans etc. R. R. Co. v. Bourgeois*, 66 Miss. 3; 14 Am. St. Rep. 534; *Davidson v. Central I. R'y Co.*, 75 Iowa, 22; *Railroad v. Scott*, 87 Tenn. 494; *Illinois C. R. R. Co. v. Person*, 65 Miss. 319; *Western etc. R'y Co. v. Lazarus*, 88 Ala. 453. Still, if every precaution was used after the discovery of the animal upon the track, but the engine was then too near it to avoid the accident, whereby it was killed, the company is not liable: *Palmer v. Northern P. R. R. Co.*, 37 Minn. 223; 5 Am. St. Rep. 839; *Savannah etc. R'y Co. v. Rice*, 23 Fla. 575; *Kansas City etc. R'y Co. v. Kirksey*, 49 Ark. 366; *Bedford v. Louisville etc. R. R. Co.*, 65 Miss. 385; *Gulf etc. R'y Co. v. Keith*, 74 Tex. 287. However, in *Carlton v. Wilmington etc. R. R. Co.*, 105 N. C. 365, the rule is laid down that the test of negligence on the part of a railroad company, in an action for killing live-stock, is, not whether the proper effort was used to prevent the killing after the animal is seen, but whether by the proper care in looking ahead the employees in charge of the train might have discovered it in time to avoid the accident. And in such cases whether it was negligence on the part of the train-men in failing to discover the animal in the proper time is a question of fact for the jury: *Kent v. New Orleans etc. R'y Co.*, 67 Miss. 608. The general rule may be stated that no recovery can be had for the killing of an animal by a railway train, where there was no negligence on the part of the train-men: *East Tennessee etc. R. R. Co. v. Walters*, 77 Ga.

69; *Louisville etc. R'y Co. v. Green*, 120 Ind. 367; *Moore v. Burlington etc. R'y Co.*, 72 Iowa, 75; or when the owner was guilty of contributory negligence: *Union P. R'y Co. v. Hutchinson*, 39 Kan. 485; *Hanna v. Terre Haute etc. R. R. Co.*, 119 Ind. 317; *Ft. Wayne etc. R. R. Co. v. Woodward*, 112 Ind. 118; *Grove v. Burlington etc. R'y Co.*, 75 Iowa, 163; *Davidson v. Central I. R'y Co.*, 75 Iowa, 22.

In the absence of negligence, a railroad company is not liable for animals injured or killed, when they come upon the track at a place where it is not required by law to be fenced, such as at private farm-crossings: *Louisville etc. R'y Co. v. Etzler*, 119 Ind. 39; *Hunt v. Lake Shore etc. R'y Co.*, 112 Ind. 69; or at depot and station grounds: *International etc. R. R. Co. v. Dunham*, 68 Tex. 231; *Moser v. St. Paul etc. R. R. Co.*, 42 Minn. 480; *Wilder v. Chicago etc. R'y Co.*, 70 Mich. 382; *Stern v. Railroad Co.*, 76 Mich. 591; *Bechdolt v. Grand Rapids etc. R'y Co.*, 113 Ind. 343; *Johnson v. Chicago etc. R'y Co.*, 75 Iowa, 157. The burden rests upon the company, however, to prove that it was not required to fence the track at the place where an animal was killed: *Cox v. Minneapolis etc. R'y Co.*, 41 Minn. 101; *Kobe v. Northern P. R. R. Co.*, 36 Minn. 518.

The legislature may require a railroad company to fence its track: *Railway Co. v. Rowland*, 70 Tex. 298; except at certain designated places: *Centralia etc. R. R. Co. v. Brake*, 125 Ill. 393; and a failure of the company to do so renders it liable, *prima facie*, for animals killed or injured by its trains: *Centralia etc. R. R. Co. v. Brake*, 125 Ill. 393; *Jeffersonville etc. R. R. Co. v. Dunlap*, 112 Ind. 93; *Leavenworth etc. R'y Co. v. Forles*, 37 Kan. 445; *Union P. R'y Co. v. Blum*, 23 Neb. 404; *Missouri P. R'y Co. v. Metzger*, 24 Neb. 90; *Hindman v. Oregon etc. Nav. Co.*, 17 Or. 615; *Donnegan v. Erhardt*, 119 N. Y. 469; *Railroad Co. v. Hoffhines*, 46 Ohio St. 643; *Chicago etc. R'y Co. v. Barnes*, 116 Ind. 126. The question as to the sufficiency of a fence built by a railroad company along its roadway is for the jury: *Payne v. Kansas City etc. R'y Co.*, 72 Iowa, 214. In *Story v. Chicago etc. R'y Co.*, 79 Iowa, 402, it is decided that where, by the undue speed of a train passing through the station grounds, cattle are stampeded, and run upon the track beyond the grounds, where they had no right to be, and without checking the train they are killed, the railway company is liable.

It is incumbent upon a railway company to maintain cattle-guards to prevent animals from going upon the roadway, which has been fenced: *Kobe v. Northern P. R. R. Co.*, 36 Minn. 518; but it need not maintain them at street crossings within the station grounds: *Stern v. Railroad Co.*, 76 Mich. 591. Having properly constructed cattle-guards, the company is liable for negligence in their maintenance: *Wait v. Railroad Co.*, 61 Vt. 268; *Stacey v. Winona etc. R. R. Co.*, 42 Minn. 158; *Grahlman v. Chicago etc. R'y Co.*, 78 Iowa, 564.

FORT v. STATE.

[52 ARKANSAS, 180.]

CRIMINAL LAW — INSTRUCTIONS — ASSUMPTION OF GUILT. — Where it appears from the whole charge that the court did not intend to interfere with the right of the jury to believe the testimony of a witness, but simply to inform it that if it believed it, other evidence would be necessary to warrant a conviction, a clause in the charge, that such witness was "an accomplice," cannot be construed as an assumption of defendant's guilt.

CRIMINAL LAW — BURGLARY — EVIDENCE. — On the trial of one defendant who is jointly indicted with another for the burglary of a county treasury, evidence that one, in the absence of the other, proposed to obtain money, through the witness, from the county treasury is admissible, when it is shown that the proposition was renewed by both defendants, and that their conduct on these occasions was part of a conspiracy to induce the witness to aid them in committing the burglary.

CRIMINAL LAW — BURGLARY — EVIDENCE. — On a trial for burglary, it is not reversible error to allow a witness to state that force had been applied from the outside to break the lock of an inner vault door secured by an ordinary lock and key. Such evidence is rather a conclusion of fact than an expression of opinion.

CRIMINAL LAW — BURGLARY — EVIDENCE. — On a trial for burglary, it is not error to refuse to allow a witness, who had testified fully as to the appearance of certain locks and doors after the burglary, to state whether he thought the inner vault door was opened first, and the lock broken afterwards, as such statement would involve a speculative opinion, not necessarily based on what he had observed.

CRIMINAL LAW — BURGLARY — CORROBORATING EVIDENCE OF ACCOMPLICE. — On a trial for burglary, the evidence of the prosecuting witness, who was also an accomplice of the defendants, and who testified to their guilt, is sufficiently corroborated to sustain their conviction, where it is shown that one of the defendants admitted that he had entertained a proposition from the prosecuting witness to commit the burglary, and agreed to and submitted the matter to the other defendant, who confessed that he joined in the conspiracy, and obtained the combination of a safe from the prosecuting witness for the purpose of committing the burglary; that the crime was committed by some one who knew the combination; that on the night of its perpetration defendants came to the town wherein the safe was situated, without apparent business, and left before daylight, and that they afterwards denied having been in town that night.

APPEAL from a conviction of burglary against Hiram and Jeff Fort.

Duval and Cravens, for the appellants.

W. E. Atkinson, attorney-general, and *T. D. Crawford*, for the state.

COCKRILL, C. J. In the course of its charge, the court told the jury that Hawkins Corley, upon whose testimony the

state relied for a conviction, was an accomplice. The appellants, without making specific objection to that part of the charge at the trial, but relying solely upon a general objection to the entire charge, now single out that clause, and argue that it is erroneous because it assumes that they are guilty. A survey of the whole charge does not warrant the assumption, but leaves the unmistakable impression that the court did not intend to interfere with the jury's right to believe Corley's statement, but to inform them that if they believed it, it would still require other evidence connecting the defendants with the commission of the offense to authorize a conviction. The charge fairly covered the whole subject pertaining to the defendants' guilt or innocence, and no objection worthy of serious reflection is urged against any other part of it. As it sufficiently covers every other phase of the case, it was not error to refuse other prayers for instructions.

Our attention is directed to many objections to the admission and rejection of testimony. Most of them relate to rulings of the court which were clearly right, or were not prejudicial to the defendants. Of the former class is the objection in Hiram Fort's case to the testimony of Corley, to the effect that Jeff Fort made propositions to obtain money through him from the county treasury, at a time when Hiram was not present. Proof was adduced to the effect that the two together renewed the offer, and a foundation for the testimony was laid also, by proof tending to show that their conduct on these occasions was part of a conspiracy to induce Corley to aid them in robbing the treasury.

On the other hand, the admission of the evidence of the witness offered by the state to prove that a writing, supposed to have been left on the scene of the crime by one of the perpetrators, was the work of one of the defendants could not have prejudiced him, because the witness's testimony was altogether favorable to him; and it cannot be said that the court erred in permitting the bail bond, which it was conceded contained the defendant's genuine signature, for the purpose of showing, by comparison, that the defendant wrote the criminalizing paper, because no objection was made at the trial to its introduction.

Again, Wilkins testified, on behalf the state, as to the condition of the safe locks and doors after the burglary, and was permitted, against the defendants' objection, to state that force had been applied from the outside to break the lock of

the inner vault door, which had been secured by an ordinary lock and key. This, however, was only a conclusion of fact drawn from appearances; it was in reference to an ordinary transaction which any man of common understanding was capable of comprehending, but which could not be reproduced or described to the jury precisely as it appeared to the witness; and while it may not be the right of a party to demand an expression of opinion of a witness under such circumstances, it is not reversible error to permit it: *Commonwealth v. Sturtivant*, 117 Mass. 122; 19 Am. Rep. 401; *McIntosh v. Livingston*, 41 Iowa, 219; 1 Thompson on Trials, 379.

Whittaker, on the part of the defendant, who had also examined the locks and doors, was allowed to testify fully to the conditions he observed, and it was not error to refuse to allow him to answer the question, "Do you think the inner vault door was opened first, and the lock broken afterwards?" The question called for a speculative opinion, not necessarily based on what he had observed. It called for a more comprehensive opinion than Whittaker had given.

It is argued that there is no evidence corroborating the testimony of the accomplice which tends to connect the defendants with the commission of the offense.

To test the legality of a verdict under such circumstances, the rule of appellate courts is, to take the strongest statement of the case against the defendant that the evidence would warrant the jury in finding, if the facts were specially found. Pursuing this course, we have this state of facts, outside of the accomplice's testimony.

In Jeff Fort's case we have his admission, upon the witness-stand, that he entertained a proposition from Corley to take the combination of the treasurer's safe, and enter the scheme to rob the treasury, and that he agreed to submit the matter to his brother Hiram, which he says he did; and in Hiram's case we have the testimony of several witnesses to his confession that he had joined in the conspiracy, and obtained the combination of the safe from Corley to effect the burglary. It was proved that both the defendants were farmers residing some three miles from the county seat, where the treasurer's funds were kept; that they were in town on the day of the burglary, and left, as though for home, late in the afternoon; that they returned to the town after dark on an inclement, blustering winter night, without any ostensible cause, leaving before daylight, and that they afterwards denied having been

in the town during the night. The burglary was committed that night by some one who had the combination which opened the safe, and who shattered the lock after the safe was opened, as a blind to detection.

These facts certainly tended to connect the defendants with the commission of the offense, and the jury was warranted in finding that they were sufficient corroboration of the testimony of the accomplice.

Let the judgment be affirmed.

CRIMINAL LAW — ERRORS TO BE DISREGARDED ON APPEAL. — A prisoner cannot complain of errors which are in his own favor: *People v. Call*, 1 Denio, 120; 43 Am. Dec. 655; nor can he ask a reversal of a judgment of conviction for errors to which he made no objection in the trial court: *Clark v. State*, 12 Ohio, 483; 40 Am. Dec. 481.

CONSPIRACY — EVIDENCE. — Acts and declarations of a conspirator, when admissible against his co-conspirator: See note to *Spies v. People*, 3 Am. St. Rep. 487, 488.

WITNESSES — OPINIONS. — As to when the opinions of non-expert witnesses are admissible in evidence, see *Commonwealth v. Sturtivant*, 117 Mass. 122; 19 Am. Rep. 401, and particularly note 410-412.

BLOCK v. VALLEY MUTUAL INSURANCE ASSOCIATION.

[52 ARKANSAS, 201.]

INSURANCE. — THERE IS NO DISTINCTION BETWEEN MUTUAL INSURANCE COMPANIES and mutual benefit societies, except where a statute has created a difference.

INSURANCE. — RIGHTS OF INSURED, or of persons claiming insurance in either a mutual insurance company or a mutual benefit society, arise out of and depend upon the contract between the parties, and must be ascertained and fixed by that contract, regardless of the character of the company; and the fact that the object of the latter in entering into the contract may be benevolent can import no new meaning to the unambiguous terms of the contract.

INSURANCE — MUTUAL BENEFIT SOCIETY. — RIGHT OF MEMBER of mutual benefit society to change the beneficiary named in his certificate arises, not from the character of the association, but from the contract between the parties.

INSURANCE — MUTUAL BENEFIT SOCIETY — CHANGE OF BENEFICIARY — ASSIGNMENT OF INTEREST IN BENEFIT FUND. — Where the contract of insurance between a mutual benefit society and its member, as shown by his certificate of membership and the charter and by-laws of the association, reserves no right in him to substitute another beneficiary for the one originally named in his certificate, but provides that the policy may be assigned, the right of the designated beneficiary becomes vested, and he may assign his interest in the policy, while the member cannot substitute another beneficiary so as to divest the rights of the one first named.

Sanders and Watkins, and J. D. Block, for the appellants.

N. W. Norton, for the appellees.

HEMINGWAY, J. One Charles B. Guthrie obtained a policy of insurance upon his life from the Valley Mutual Insurance Company. It undertook, upon the conditions therein named, to pay to Mrs. Martha A. Guthrie, James M. Harvey, and Alice Guthrie one thousand dollars, within ninety days after proof of the death of Charles B. Subsequently, Charles B. and Mrs. Martha A. Guthrie assigned the policy to the plaintiffs, who thereafter paid all dues and premiums as they matured, according to its terms. Upon the death of the said Charles B., the plaintiffs claimed the amount due upon the policy, by virtue of the assignment, and the beneficiaries therein named, by virtue of the provisions of the policy.

The court found that the plaintiffs acquired, by the assignment, the interest of Martha A. Guthrie, and no more; that they were entitled to recover her interest in the fund, and three fourths of what they had advanced in keeping the policy alive, while James M. Harvey and Alice Guthrie were entitled to recover the balance. Judgment was rendered accordingly.

As grounds for reversal, the appellants urge, — 1. That the insurance company is not a regular insurance company, but a mutual benefit company; 2. That the policy of an insurance company differs from the certificate of a mutual benefit company in this, that the rights of the beneficiary in the one are vested upon the issuance of the policy, while those rights in the other are subject to be divested at any time until the death of the insured, by the substitution of another beneficiary.

The record contains no part of the company's charter or articles of association, and but one clause of its by-laws. It is as follows: "The object of this association shall be for the purpose of mutually associating together a number of individuals into an agreement, whereby the survivors mutually contribute for the relief of the representatives, legal heirs, or assignees of those of their number whom death may strike down."

The policy sued on contains no reference to any other purpose than one of insurance, and provides the ordinary safeguards against the acceptance of bad risks, as well as against the continuance of risks accepted, unless the stipulated payments upon it are promptly made as they mature. These pay-

ments include "annual dues" and "mortality assessments," and a failure to pay either for thirty days after call effects a cancellation of the policy. It contains this clause, upon which appellant relies especially: "This certificate may be assigned, transferred, or set over by and with the consent of the association, granted by its president or secretary."

The record discloses nothing further as to the character of the company. Upon this the learned counsel for appellants say that they assume that it will be conceded to be a mutual benefit society. What feature is disclosed that does not belong to a mutual insurance company? The first by-law, in making a general declaration of its purpose, declares that it is to afford relief; but also declares that the relief will be given to "the representatives, legal heirs, or assigns of those of their number whom death may strike down," and this is exactly what insurance companies are required to do. Yet this is not benevolence, for it is undertaken for a stipulated profit, the continued payment of which is a continuing condition to its existence. If any other character of benevolence was contemplated by the company, the record does not disclose it. Certain it is that the policy exhibited contains no intimation of its existence.

We have no statute distinguishing between insurance companies and benefit companies with insurance features. Such statutes have been enacted in other states; they define the properties of the latter that entitle them to privileges or exemptions not accorded the former. The distinguishing feature generally is, that they contemplate gain, while these contemplate benevolence only. Within the scope of their benevolence is included, with many fraternal objects, the providing of a fund to be paid upon the death of members, in which this is regarded as but an incident of the main object. Subjected to the tests made in those states, we have found no decision which leads us to think that the contract sued upon would be viewed in any other light anywhere than as an ordinary insurance policy. It exactly fits the definition of an insurance policy as made by Mr. Justice Gray, which has been generally adopted as correct: *Commonwealth v. Wetherbee*, 105 Mass. 160; Niblack on Mutual Benefit Societies, sec. 163.

It is said that the character of the benefit association is dual: First, fraternal; second and incidentally, financial: Bacon on Benefit Societies, sec. 283. If the incident be eliminated from the case at bar, there is nothing left. That stamps

it an ordinary insurance policy: *State v. Miller*, 66 Iowa, 26; *State v. Citizens' Benefit Ass'n*, 6 Mo. App. 163; *Farmer v. State*, 69 Tex. 561; *People v. Nelson*, 46 N. Y. 477.

Moreover, we have found no case which recognizes any distinction between the mutual insurance and the mutual benefit society, except in states where the statute makes a difference. But regardless of the character of the company, the rights of persons claiming insurance arise out of and depend upon contract and must be ascertained and fixed by contract. Although the object of the company in entering into the contract may be benevolent, this purpose can import no new meaning to the unambiguous terms of a writing.

When the courts are invoked, the contract measures the rights of one and the obligation of the other party, and relief must be granted, if at all, according to its terms: Niblack on Mutual Benefit Societies, secs. 163-165; Bacon on Benefit Societies, sec. 304; *Holland v. Taylor*, 111 Ind. 125.

That the member of a mutual benefit society may change the beneficiary named in the certificate has been frequently held; not, however, because of the character of the society, but because of the stipulation contained in the certificate expressly authorizing it. In most cases, such certificates as have been the subject of judicial discussion contained express stipulation that the beneficiary named might be changed; in others, the articles of association or by-laws contain such provisions, and are by the terms of the policy made a part of it. The effect in each case is the same.

If such a purpose was entertained in making the contract sued upon, it does not appear. The clause set out provides that the policy may be assigned. This does not mean that another beneficiary may be substituted by the insured, for substitution and assignment are quite different things; it simply intends that the beneficiary may assign his interest. The insured had no interest to assign. That was vested in the parties named: Bliss on Life Insurance, sec. 318; Bacon on Benefit Societies, sec. 392. He had no power of substitution, because none is reserved in the contract, or in the charter or by-laws of the association, incorporated into the policy.

The learned counsel have shown very commendable industry in examining authorities, and equal skill in presenting them. We have carefully examined every case cited, and very many to which we have found reference elsewhere. The

result is, that we are satisfied that the judgment of the circuit court is correct, and it is affirmed.

MUTUAL BENEFIT ASSOCIATIONS. — For a thorough discussion of the law relating to mutual benefit associations, see extended note to *Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 781-791; *Union Mut. Ass'n v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519, and note 526, 527.

DAVIE v. DAVIE.

[52 ARKANSAS, 224.]

JUDGMENTS. — RIGHT OF APPEAL is limited in general to final judgments, and does not extend to interlocutory orders, and a judgment in equity is understood ordinarily to be interlocutory when inquiry as to a matter of law or fact is directed preparatory to a final adjudication of the rights of the parties.

JUDGMENTS — RIGHT OF APPEAL. — Where a decree decides the rights to the property in contest, and directs it to be delivered up, or to be sold, and the complainant is entitled to have it carried into immediate execution, the decree is final to that extent, and therefore appealable, although a further decree may be necessary to adjust the account between the parties.

JUDGMENTS. — APPEAL FROM A JUDGMENT IS ALLOWED, where it finally determines a distinct and severable branch of the case, although the suit is not ended.

JUDGMENTS — RIGHT OF APPEAL. — A decree which is in form a final order adjudicating the parties' proportionate interests in the land in controversy, retaining the cause with reference to a master, who is directed to report at a subsequent term, and the court has yet to determine, upon the coming in of the report, what amounts shall be charged as liens upon the several interests, and whether there shall be a sale to satisfy the same, must be regarded as an interlocutory order from which an appeal will not lie.

EJECTMENT by E. Davie and others, against J. M. Davie, to recover land to which they claim title as heirs of J. C. Davie, deceased. J. M. Davie claims the land as devisee of Caroline M. Davie, deceased, and widow of J. C. Davie, who claimed title through the heirs. One of these conveyances was executed by E. A. Finch in consideration of one thousand dollars. M. E. Clement acquired an alleged interest in the land, by purchase from her guardian, for \$333. J. C. Davie is alleged to have sold the land to Watson, Weld, and others for five thousand dollars, and at the time of his death, to have held their notes for this money, while they held his bond for title. His widow is alleged to have bought the land from these vendees, and to have paid his administrator the amount

due on their notes; that having thus become the equitable owner, she devised the land to defendant, who, since her death, has made valuable improvements. The sale by Watson and others to Caroline M. Davie is denied, and the conveyances from the heirs to her claimed to have been obtained by false and fraudulent representation. The decree appealed from is as follows: "Upon consideration whereof, it appearing J. D. Garrison, A. J. Garrison, Edward Garrison, Mrs. M. A. Hallaman, Mrs. M. McCutchen, and H. Q. Finch are entitled to have and recover of and from the defendant one fourth of the lands in controversy, as the heirs at law of Elizabeth A. Finch, sister of J. C. Davie, deceased; that Edward N. Davie and Mary E. Clement, as heirs at law to Ashbourne Davie, brother of J. C. Davie, deceased, are entitled to have and recover of and from the defendant two thirds of one fourth of the lands in controversy, — it is therefore considered, ordered, and adjudged by the court that the plaintiffs J. D. Garrison, A. J. Garrison, Edward Garrison, M. A. Hallaman, M. McCutchen, and H. Q. Finch have and recover from the defendant one fourth of the lands in controversy, to wit (describing the land); and that the plaintiff Edward N. Davie and M. E. Clement have and recover of the defendant two thirds of one fourth of the above-described tract or parcel of land, and all costs herein expended. And it is further ordered by the court that this cause be referred to R. H. McCulloch, as special master herein, who is directed to take and state an account of the amount of purchase-money paid or expended to Louis H. Weld and others by Caroline M. Davie, at the surrender to her of their title bonds; also, the amount of taxes paid, and all valuable and lasting improvements made on said lands by the defendant since the death of Mrs. Caroline M. Davie; also the amount of the reasonable rental value of said land and premises from the year 1882, inclusive, to date. The master is further instructed to charge J. D. Garrison, A. J. Garrison, and Edward Garrison, and M. A. Hallaman, Mrs. M. McCutchen, and H. Q. Finch with such *pro rata* or proportional part of the one thousand dollars received by their mother, Elizabeth A. Finch, as the value of the land herein recovered by them bears to the interest she was entitled to in the whole estate, both real and personal, of J. C. Davie, with six per cent interest; also to charge M. E. Clement with such *pro rata* part of the \$333 received by her as the value of the land recovered by her bears to her entire interest, real and per-

sonal, in said estate of J. C. Davie, with six per cent interest, and report at the next term of this court."

W. R. Coody, and S. S. Cockcroft, for the appellants.

COCKRILL, C. J. The right of appeal is limited, in general, to final judgments, and does not extend to interlocutory orders: *Ex parte Baterville etc. R. R. Co.*, 39 Ark. 82. The object of the limitation is to present the whole cause here for determination in a single appeal, and thus prevent the unnecessary expense and delay of repeated appeals. A judgment in equity is understood ordinarily to be interlocutory when inquiry as to matter of law or fact is directed preparatory to a final adjudication of the rights of the parties: *Beebe v. Russell*, 19 How. 283. But "where the decree decides the rights to the property in contest, and directs it to be delivered up, or directs it to be sold, and the complainant is entitled to have it carried into immediate execution, the decree must be regarded as final to that extent, although it may be necessary for a further decree to adjust the account between the parties": *Forgay v. Conrad*, 6 How. 206; *Thompson v. Dean*, 7 Wall. 342. The appeal is allowed in such cases to prevent irreparable injury pending the suit. It is allowed also where a distinct and severable branch of the cause is finally determined, although the suit is not ended: *State v. Shall*, 23 Ark. 601; *Nichol v. Dunn*, 25 Ark. 129. But the unnecessary splitting of causes by courts of chancery creates confusion and difficulty in practice, and is condemned: *Tucker v. Yell*, 25 Ark. 431; *Hicks v. Hogan*, 36 Ark. 298; *Drake v. Thyng*, 37 Ark. 228; *Forgay v. Conrad*, 6 How. 206.

In this case, while the decree takes the form of a final order in adjudicating the parties' proportionate interests in the land, it is apparent that the court has not fully adjudicated that branch of the cause. The relative interests of the parties in the land has been ascertained and determined, but the cause is retained with a reference to a master, who is directed to report at a subsequent term, and the court is yet to determine, upon the coming in of the report, what amounts shall be charged as liens upon the several interests, and whether there shall be a sale of some of the interests to satisfy the same. The decree does not direct its execution, but looks to further judicial action before that event. The plaintiffs can suffer no injury by awaiting the termination of the litigation.

The first subdivision of section 1265 of Mansfield's Digest

does not undertake to grant the right of appeal from an interlocutory order, but provides only what the law was without it, that such an order can be reviewed on appeal from the final judgment. The appeal is premature: *Cases supra*; *Cohn v. Hamlet*, 44 Ark. 344; *Burlington etc. R'y Co. v. Simmons*, 123 U. S. 52; *Gray v. Palmer*, 9 Cal. 632.

Appeal dismissed.

JUDGMENTS, WHAT MAY BE APPEALED FROM. — A final judgment may be appealed from: *Simmons v. Spratt*, 22 Fla. 370; *Jackson v. Meyers*, 120 Ind. 505; *Martin v. Phippin*, 101 N. C. 452; *Hammer v. Polk County*, 15 Or. 578; and a final judgment may be said to be one that constitutes an award of judicial consequences which the law attaches to facts, and which determines the subject-matter of the controversy between the parties: *West v. Bagby*, 12 Tex. 34; 62 Am. Dec. 512. An appeal will not lie from an interlocutory judgment or decree: *Watson v. Sutra*, 77 Cal. 609; *Taylor v. Board of Comm'rs*, 120 Ind. 121; *Jackson v. Meyers*, 120 Ind. 505; *Chicago etc. R'y Co. v. Day*, 76 Iowa, 278; *King v. Barnes*, 107 N. Y. 645; *Lane v. Richardson*, 101 N. C. 181; unless it determines the action, or affects some substantial right of one or more of the parties: *Clement v. Foster*, 99 N. C. 255. A judgment taxing costs is not such an adjudication of the rights of a witness that he may appeal therefrom: *Perkins v. Della Pine L. Co.*, 66 Miss. 378. No appeal can be taken from a final judgment, until it has been entered: *Onderdonk v. San Francisco*, 75 Cal. 534; *Coom v. Grand Lodge*, 76 Cal. 354; *Jones v. Givens*, 77 Iowa, 173.

ORDERS, WHAT MAY BE APPEALED FROM. — Whether an order is appealable or not depends more upon what it purports to determine, than upon its actual effect: *Bullock's Estate*, 75 Cal. 419. The general rule is, that an appeal lies from an order only when it determines the action or affects some substantial right of the appellant: *Martin v. Phippin*, 101 N. C. 452; *Clement v. Foster*, 99 N. C. 255; *State v. Smith*, 74 Iowa, 580; *Ogden v. Eschminger*, 75 Iowa, 30; *McDowell v. Western etc. Asylum*, 101 N. C. 656; *Harrison Moch. Works v. Hoag*, 73 Wis. 184; *Dorland v. Hanson*, 81 Cal. 202; 15 Am. St. Rep. 44; *Osing v. Klamath County*, 16 Or. 244. For orders that are appealable, see *Van Rensselaer v. Jewett*, 6 Hill, 373; 41 Am. Dec. 750; *Pinekey v. Heneghan*, 2 Strob. 250; 49 Am. Dec. 592; *Table Mountain etc. Co. v. Waller's etc. Co.*, 4 Nev. 218; 97 Am. Dec. 526; *Simpson v. Pearson*, 31 Ind. 1; 99 Am. Dec. 577; *Koveler v. Ball*, 2 Kan. 160; 85 Am. Dec. 451; *Starbuck v. Dunklee*, 10 Minn. 168; 85 Am. Dec. 68. The following orders have been held to be non-appealable: An order striking out parts of a complaint: *Erley v. Berryhill*, 36 Minn. 117; *Weich v. Oakhorn*, 22 Neb. 166; *Cleland v. Wallbridge*, 78 Cal. 358; *Fisher v. Schurr*, 73 Wis. 370; *Sunzin v. Bursette*, 76 Cal. 299; an order granting an amendment to a proposed statement of the case on a motion for a new trial: *Yerian v. Lindheimer*, 80 Cal. 133; an order dismissing the petition of an intervenor: *McRobbie v. Hippinbotham*, 11 Col. 312; an order refusing to require an election between two counts in a complaint, the counts being substantially alike: *Skinner v. West Side etc. R. R. Co.*, 74 Wis. 447; an order refusing to strike out a demurrer for frivolousness: *Stevens v. Sholes*, 72 Wis. 214; an order overruling a demurrer to a petition in insolvency by the creditors of an insolvent, and requiring the insolvent to answer within a certain time: *Taxes v. Tyler*, 71

Md. 506; an order refusing to strike out an answer: *National etc. Bank v. Cargill*, 39 Minn. 477; an order setting aside a decree, and permitting a defendant to plead to an answer filed by a co-defendant: *Cockle Separator Mfg. Co. v. Clark*, 23 Neb. 702; an order in a proceeding to have a homestead appraised at the instance of a judgment creditor: *Brown v. Starr*, 75 Cal. 163; an order refusing to compel a clerk of court to pay over certain funds in his hands belonging to the estate of a deceased: *Poten's Estate*, 72 Cal. 576; an order refusing to vacate an order for a new trial: *Larkin v. Larkin*, 76 Cal. 323; an order refusing to entertain a motion for taxing fees in an attachment suit: *Greehn v. Shumway*, 73 Cal. 263; an order denying a motion to hear again a motion for a new trial, the latter motion having been denied sixty days or more before: *Romine v. Cralle*, 80 Cal. 626; an order issued in supplementary proceedings, forbidding the execution defendant to transfer any of his property whereby the plaintiff might be hindered in satisfying his judgment: *Rule v. Gumeer*, 12 Col. 591; an order denying a motion to vacate the appointment of a receiver, and to require him to pay over funds held by him: *Boyd v. Cook*, 40 Kan. 675; an order by a justice of the peace, requiring a garnishee to pay money into court: *Williams v. Brechler*, 75 Wis. 309; an order denying a motion for judgment on a verdict: *Treat v. Hiles*, 75 Wis. 265; an order for a judgment: *State v. Bechdel*, 38 Minn. 278; an order setting aside a verdict and granting a new trial: *Fisk v. Henarie*, 15 Or. 89; *Iron Mountain Bank v. Armstrong*, 92 Mo. 265; an order declaring a recognizance forfeited: *McGuire v. State*, 119 Ind. 499; an order by county commissioners for the construction of a road and for the appointment of a committee to apportion the expenses of construction upon the lands benefited thereby: *Tomlinson v. Peters*, 120 Ind. 237; an order on defendant to produce his books: *Cook v. Railway Co.*, 75 Iowa, 169; an order refusing an appeal which ought not be allowed: *Hardin v. Watson*, 85 Tenn. 593; an order refusing to set aside a judgment or vacate another order: *Goyhinech v. Goyhinech*, 80 Cal. 409. No order can be appealed from until it is entered of record: *Rose's Estate*, 72 Cal. 577. The revised statutes of Indiana, 1881, authorizing appeals for the determination of reserved questions of law upon an abbreviated record, do not contemplate an appeal from a ruling of the court before a final judgment: *Taylor v. County Commissioners*, 120 Ind. 121.

ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILWAY v. BIGGS.

[52 ARKANSAS, 240.]

NUISANCE, LIMITATION IN ACTION FOR. — When a nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once compensated. In such case, the statute of limitations begins to run upon the construction of the nuisance.

NUISANCE, LIMITATION IN ACTION FOR. — Where a structure is permanent in character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are injuries. In such case, the statute of limitations begins to run from the happening of the injury complained

of. This rule is here applied in an action to recover damages for the overflow of land, caused by the defective construction of a railway embankment.

ACTION to recover damages sustained in 1885, through the destruction of plaintiff's levees, fencing, and crops by an overflow alleged to have resulted from the negligent construction of a railway embankment without sufficient openings to permit of the passage of water. The defendant railway company built the embankment for its road-bed, in 1873, through a river bottom adjacent to the land of plaintiff. When constructed, the embankment was placed above the overflow to which the river was subject, and was ever afterwards maintained in its original position. Judgment for plaintiff, and defendant appealed.

Dodge and Johnson, for the appellant.

Scott and Jones, for the appellee.

SANDELS, J. The alleged nuisance was constructed in 1873. The injury complained of was in 1885. It is argued by the appellant that the statute of limitations began to run against appellee upon the construction of the nuisance. *St. L., I. M., & S. R'y Co. v. Morris*, 35 Ark. 622, and *Little Rock etc. R'y Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280, are relied on as establishing this contention. The facts in those cases make them clearly distinguishable from this case.

The rules applicable to the recovery of damages for the construction and continuance of nuisances in cases of this kind are stated satisfactorily to this court by numerous authorities, as follows: Whenever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case, the statute of limitations begins to run upon the construction of the nuisance: *St. L., I. M., & S. R'y Co. v. Morris*, 35 Ark. 622; *Little Rock etc. R'y Co. v. Chapman*, 39 Ark. 463; 43 Am. Rep. 280. But when such structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case, the statute of limitations begins to run from the happening of the injury complained of: *Roberts v.*

Read, 16 East, 215; 2 Greenl. Ev. 433; *L. & N. R'y Co. v. Hays*, 14 Am. & Eng. R'y Cas. 284; *Troy v. Cheshire R. R. Co.*, 23 N. H. 83; 55 Am. Dec. 177; Wood on Nuisances, sec. 865; Wood on Limitations, 180; Angell on Limitations, 300. This case falls within the latter class.

Affirmed.

NUISANCES — STATUTE OF LIMITATIONS IN ACTIONS FOR. — The principles of law applicable to nuisances as affected by the statute of limitations are correctly stated in the principal case. The authorities agree that when the original act creating a nuisance to land is permanent in its nature, and is at once productive of all the damage which can ever result from it, and at once destroys the estate for all practical purposes, so that when the act is completed all the damage that can be effected thereby is consummated, the entire damages must be recovered in one action, and the statute of limitations begins to run against the cause of action from the time of the complete erection of the nuisance: *Troy v. Cheshire R. R. Co.*, 23 N. H. 83; 55 Am. Dec. 177; *Powers v. Council Bluffs*, 45 Iowa, 652; 24 Am. Rep. 792; *McConnel v. Kibbe*, 29 Ill. 483; *Baldwin v. Oskaloosa Gas Light Co.*, 51 Iowa, 51; *Stodghill v. Chicago etc. R. R. Co.*, 53 Iowa, 341; *Kansas Pacific R'y Co. v. Muhlman*, 17 Kan. 224; *Bizer v. Ottumwa Hydraulic etc. Co.*, 70 Iowa, 145; *Haisch v. Keokuk etc. R'y Co.*, 71 Iowa, 606; *Krueger v. Grand Rapids etc. R. R. Co.*, 51 Mich. 142; *St. Louis etc. R'y Co. v. Morris*, 35 Ark. 622; *Little Rock etc. R'y Co. v. Chapman*, 39 Ark. 463; *Chicago etc. R. R. Co. v. McAuley*, 121 Ill. 160.

What constitutes a permanent nuisance, within the meaning of the rule given above, is thus defined in a leading case: "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage, and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means": *Troy v. Cheshire R. R. Co.*, 23 N. H. 83-102; 55 Am. Dec. 177. Under the rule above stated, it has been decided that upon the construction and putting into operation of a railroad all damages to contiguous property along the line of the road, present and prospective, from the location and operation thereof, are immediately recoverable, and must all be included in one action, and if the action is not brought within the period of the statute of limitations, the recovery of any sum will be barred: *Chicago etc. R. R. Co. v. McAuley*, 121 Ill. 160; *Chicago etc. R. R. Co. v. Loeb*, 118 Ill. 203. So the statute of limitations applies to actions against a railroad company for overflowing land by the building of a levee, and commences to run as soon as the levee is completed: *St. Louis etc. R'y Co. v. Morris*, 35 Ark. 622; or where a railroad company builds a permanent dam across a river, which as soon as constructed causes the water to flow back on the injured party's lands, the same rule applies: *Bizer v. Ottumwa Hydraulic etc. Co.*, 70 Iowa, 145.

Where the erection of an embankment for a railway closes the natural channel of the stream, and diverts the water from a tract of land, the injury caused to the land thereby is permanent. For it, all damages resulting therefrom may be at once recovered in one action, against which the statute of

Limitations begins to run, upon the completion of the embankment: *Stodghill v. Chicago etc. R. R. Co.*, 53 Iowa, 341. So where a railroad cuts a passage through its embankment to allow the escape of surface water, an action for damages caused by the insufficiency of the outlet is immediately sustainable, and the statute of limitations at once commences to run, though the insufficiency of the opening is not discovered until afterwards: *Haisch v. Keokuk etc. R'y Co.*, 71 Iowa, 606. Where a city has constructed a ditch along a street in front of complainant's property in such a negligent manner that his property is at once injured, the damage resulting is original damage, for which the right of action at once arises: *Powers v. Council Bluffs*, 45 Iowa, 652; 24 Am. Rep. 792. So damages from the erection and use of gas-works is an injury of a permanent character, and begins when the works are erected and in use, from which time the statute of limitations begins to run against the cause of action: *Baldwin v. Oskaloosa Gas Light Co.*, 57 Iowa, 51.

If an erection, when completed, is permanent in character, but not necessarily a nuisance, and it afterwards becomes one, or where, though a nuisance at the time of completion, it is a continuing one, and from time to time gives a new cause of action, the statute of limitations begins to run from the time when the injury is received, and not from the time of the completion of the erection. In other words, where the nuisance is transient rather than permanent in its character, the continuance of the injurious acts is considered a new nuisance, for which a fresh action will lie; and although the original cause of action is barred, damages may be recovered for the continuance of the nuisance within the period of the statute, and where the continuance of the act is not necessarily injurious, though it is necessarily of a permanent nature, and it may or may not be injurious, or may or may not be continued, then the injury to be compensated is only the damage which has actually happened up to the time of suit: *Troy v. Cheshire R. R. Co.*, 23 N. H. 83; 55 Am. Dec. 177; *McConnel v. Kibbe*, 29 Ill. 483; *Chicago etc. R. R. Co. v. McAuley*, 121 Ill. 160; *Fell v. Bennett*, 110 Pa. St. 181; *Stadler v. Grieben*, 61 Wis. 500; *Ramsdale v. Foote*, 55 Wis. 557; *Miller v. Keokuk etc. R'y Co.*, 63 Iowa, 680; *Colrick v. Swinburne*, 105 N. Y. 503; *Athens Mfg. Co. v. Rucker*, 80 Ga. 291; *Inhabitants of New Salem v. Eagle Mill Co.*, 138 Mass. 8; *Valley R'y Co. v. Franz*, 43 Ohio St. 623.

In *McConnel v. Kibbe*, 29 Ill. 485, it was said: "The first question presented by this record is, whether an action accrues by the continuance of a nuisance; whether its continuance, distinct from its creation, is a cause of action. If its continuance, without reference to the original act from which the nuisance proceeds, is a grievance for which the action may be maintained, then a recovery may be had for damages growing out of its continuance, although the statute of limitations may have barred a recovery for the original wrongful act." Following this rule, it was decided that although a dam may have remained unchanged for twenty years, yet if, during that time, it caused the filling up of a stream and the plaintiff's land with sand, increasing the height of the water, to his injury, he might recover damages for any injury sustained within four years preceding the bringing of the action: *Athens Mfg. Co. v. Rucker*, 80 Ga. 291. And again, that as against a cause of action for damages caused by the water flowing through a ditch wrongfully dug, the statute begins to run, not from the date of digging the ditch, but from the date of the damage caused thereby: *Miller v. Keokuk etc. R'y Co.*, 63 Iowa, 680.

If a railroad company constructs its track upon a city street, without com-

compensating the owner of an adjoining lot, and in so doing becomes a trespasser, after which another company acquires the track under foreclosure proceedings, although more than the period of the statute of limitations has elapsed after the tracks were laid before the suit is commenced, still a new cause of action arose when the last company assumed to maintain the track without compensating the lot-owner, and this is not barred until the statutory period elapses from that time: *Harbach v. Des Moines etc. R'y Co.*, 80 Iowa, 593. If a railroad company builds an embankment across a wide creek bottom, and a culvert over the creek, so that all the surface water of the bottom must flow in the channel of the creek, but the culvert is not of sufficient capacity to carry off the water thus augmented, and the land of an adjoining owner is thereby flooded, and the damage thus caused is likely to be of yearly occurrence, depending upon the seasons, so that the damages cannot be estimated when the embankment is completed, the statute of limitations does not begin to run from the time of the construction of the embankment, but from the time that the injury is received: *Sullens v. Chicago etc. R'y Co.*, 74 Iowa, 659; 7 Am. St. Rep. 501. In a similar case, it was also held that the statute of limitations does not begin to run against the land-owner's right of action for the unlawful flowage of his lands until he has been injured and his action has accrued, notwithstanding the negligent structure, and other acts causing the overflow, may have been growing and working for a length of time beyond the period of limitation: *Culver v. Chicago etc. R'y Co.*, 38 Mo. App. 130. In all such cases the land-owner may recover for any damages inflicted within the period of the statutory limitation: *Reed v. State*, 108 N. Y. 407; *Polly v. McCall*, 37 Ala. 20; *Silsby Mfg. Co. v. State*, 104 N. Y. 562; *Hardesty v. Ball*, 43 Kan. 151; *Van Orsdol v. Burlington etc. R'y Co.*, 56 Iowa, 470; *Valley R'y Co. v. Franz*, 43 Ohio St. 623; *Heath v. Texas etc. R'y Co.*, 37 La. Ann. 723.

Every continuance of a nuisance is a renewal of the wrong, and actionable. Hence it is a continuing nuisance to maintain a sewer which, when the rain falls, throws upon the lot of an adjoining owner excrement, disagreeable to the smell and hurtful to health; and an action for damages received within the period of limitation will lie, although the sewer was dug more than four years before the suit was brought: *Reid v. City of Atlanta*, 73 Ga. 523.

The diversion, by the owner of land on which is a spring, of the water thereof from its natural channel, whereby the lower proprietor is deprived of the use of the water on his premises, is a continuing injury, not referable exclusively to the day when the original wrong was committed; and although that was more than six years before the commencement of the suit to recover damages, the action is not barred by the statute of limitations, except as to damages which accrued prior to the six years: *Coltrick v. Swinburne*, 105 N. Y. 503.

To an action for damages against a railroad company for an alleged nuisance, consisting of the jarring of a house, emitting noxious noises, smells, and smoke, by the running of trains, the statute of limitations cannot avail as a defense, since the acts charged are continuous, and the causes and effects are renewed from day to day: *Werges v. St. Louis etc. R. R. Co.*, 35 La. Ann. 641.

Maintaining a public nuisance for twenty years does not give a prescriptive right to continue it; and a person who suffers special and peculiar damage from it may maintain an action against the one who continues it, although the right to recover for the injury done by the creation of the nuisance is barred by the statute of limitation, provided the injury sued for is received

within the period of limitation: *Inhabitants of New Salem v. Eagle Mill Co.*, 138 Mass. 8. Thus mere delay in commencing suit, or even acquiescence in the act of the defendant, unless an equitable estoppel is created thereby, or unless he has gained a prescriptive right to maintain the nuisance, will not bar the injured party of his right to maintain suit for damages, and to abate a dam, causing the overflow of his lands, as a continuing and existing nuisance: *Mueller v. Fruen*, 36 Minn. 273.

MCQUEENY v. PHOENIX INSURANCE COMPANY.

[52 ARKANSAS, 257.]

INSURANCE — WHEN CONTRACT IS ENTIRE. — The general rule applies to insurance policies, that where the amount of insurance is apportioned to distinct items, but the premium paid is gross, the contract is entire.

INSURANCE — WHEN CONTRACT IS ENTIRE. — Where an insurance policy provides that "if, during this insurance, the premises shall become vacant or unoccupied, then, so long as the same shall remain vacant and unoccupied, this policy shall cease and be of no force," and the property insured for separate sums, in consideration of the payment of a gross premium, consists of two houses, thirty feet apart, in the same inclosure, one of which was occupied as a residence, the other vacant, at the time of loss, the premises insured consist of both houses within the meaning of the policy, and the policy is not suspended so long as either of them is occupied.

L. Leatherman, for the appellant.

HEMINGWAY, J. The appellant brought suit against the appellee upon a policy of insurance, whereby, in consideration of a stated premium, it insured him against loss by fire, in the sum of one thousand dollars, the amount being apportioned as follows: six hundred dollars upon a residence, and four hundred dollars upon a frame house held to let. It was alleged and admitted that both houses were destroyed by fire during the term of the policy.

The policy contained the following clause: If, during this insurance, the above-mentioned premises shall become vacant or unoccupied, or if the occupation or the possession of such premises is changed, except as herein specially agreed to in writing upon this policy, then and from thenceforth, so long as the same shall continue vacant or unoccupied, or shall be so appropriated, applied, or used, this policy shall cease and be of no force and effect."

The two houses covered by the policy were about thirty feet apart, and in the same inclosure. At the time of the fire one was occupied by the assured as a residence, while the other was unoccupied.

The company paid the loss on the residence, but declined to pay the loss on the other house, because it was vacant; the assured instituted this suit to recover the loss upon the latter house. The controversy depends upon the construction of the clause recited.

The appellant contends that the two houses comprised the premises within its meaning, and that the premises were occupied so long as either house was occupied.

The appellee contends that each house comprised separate premises within its meaning, and that upon either house becoming vacant, the insurance upon it was suspended. The court sustained the contention of appellee, and this raises the only question presented for our consideration.

The appellee insured two houses for separate sums. The consideration paid was a gross sum. The rate of insurance is not disclosed; whether it was the same upon each house, or different, does not appear.

The construction of this and similar clauses in policies of insurance have often received judicial consideration, and there is perhaps no question upon which the conflict between different courts is more clearly defined. An examination satisfies us that the cases decided in different courts cannot be harmonized, and we have attempted to ascertain and follow those most in consonance with correct principle.

The learned judge who tried this cause, following one line of decision, seems to have considered that the clause should be construed in the same way in this contract as a like provision would be construed in a several policy on each of the subjects insured; in other words, that the contract, though entire in form, is divisible in substance. That it was competent for the parties to make such a contract is conceded. That they so intended is not obvious from the clause under consideration. The natural significance of the terms employed is, that if the entire premises should become vacant, the entire policy should cease during such vacancy. If the parties had intended to make a separate contract as to each subject of the contract, their purpose might have been easily accomplished by saying that if the premises or any part thereof should become vacant, the insurance, *pro tanto*, should cease. Such intention is often so manifested in similar policies, and we see no reason why it would not have been done in this case, if it had been entertained.

Mr. Parsons says: "If the consideration to be paid is single

and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items": 2 Parsons on Contracts, 519; *Johnson v. Johnson*, 3 Bos. & P. 162; *Miner v. Bradley*, 22 Pick. 457.

In the case of *McClurg v. Price*, 59 Pa. St. 420, it is said: "If the consideration is single, the contract is entire, whatever the number or variety of the items embraced in its subject."

Our attention is called to no case in which the correctness of this statement of the general rule is denied or questioned. It has been stated and approved by many authors and courts.

But it is said that "a policy of insurance is a contract so different from those in which these general rules have been laid down, that it is doubtful whether they can be applied to this peculiar contract, or in what manner the application of them should be made": *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 530; 27 Am. Rep. 582. In what the difference consists, or why those general rules which the wisdom of our jurisprudence has formulated to govern in the consideration of contracts should not be applied in construing insurance policies, is not stated, nor apparent to us. We can see no good reason why a contract which, if made between individuals, would be entire, should be divisible if made between an individual and an insurance company.

Mr. Wood and Mr. May each seemed to think that the general rule applies to insurance policies, and that where the amount of insurance is apportioned to distinct items, but the premium paid is gross, the contract is entire: May on Insurance, secs. 189, 277; 1 Wood on Insurance, 384.

This view is sustained by the courts of last resort in the states of Maine, Massachusetts, Pennsylvania, Maryland, Virginia, Wisconsin, Michigan, and Minnesota. It receives support from the courts of New Hampshire and Vermont, although not expressly approved by them; and the supreme court of West Virginia, in a case much like the one before us, held the contract entire: *Day v. Charter Oak etc. Ins. Co.*, 51 Me. 91; *Lovejoy v. Augusta Mut. F. Ins. Co.*, 45 Me. 472; *Richardson v. Maine Ins. Co.*, 46 Me. 394; 74 Am. Dec. 459; *Friesmuth v. Agawam etc. Ins. Co.*, 10 Cush. 587; *Lee v. Howard F. Ins. Co.*, 3 Gray, 583; *Gottzman v. Pennsylvania Ins. Co.*, 56 Pa. St. 210; 94 Am. Dec. 55; *Fire Ass'n of Phila. v. Williamson*, 26 Pa. St. 196; *Associated F. Ins. Co. v. Assum*, 5 Md. 165; *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620; *Moore v. Virginia Fire Ins.*

Co., 28 Gratt. 508; 26 Am. Rep. 373; *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159; *Schumitsch v. American Ins. Co.*, 48 Wis. 26; *Ætna Ins. Co. v. Rash*, 44 Mich. 55; 38 Am. Rep. 228; *Plath v. Minn. etc. Ins. Co.*, 23 Minn. 479; 23 Am. Rep. 697; *McGowan v. People's Mut. F. Ins. Co.*, 54 Vt. 211; 41 Am. Rep. 843; *Baldwin v. Hartford Ins. Co.*, 60 N. H. 422; 49 Am. Rep. 324; *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605.

Opposed to this view we find decisions of the courts of last resort in the states of New York, Illinois, Missouri, Kentucky, and Nebraska, and the decision, before referred to, in *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 530; 27 Am. Rep. 582; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 462; 29 Am. Rep. 184; *Peoria etc. Ins. Co. v. Anapow*, 51 Ill. 283; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; 81 Am. Dec. 521; *Koontz v. Hannibal etc. Co.*, 42 Mo. 126; 97 Am. Dec. 325; *Loehner v. Home Mutual Ins. Co.*, 19 Mo. 628; *State Ins. Co. v. Schreck*, 27 Neb. 527.

The force of the Kentucky case is much impaired by the fact that it relied on the case of *Clark v. New England etc. Ins. Co.*, 6 Cush. 342, 53 Am. Dec. 44, which has never been followed in its own state, but impliedly overruled in several later cases.

The New York supreme court had held such contracts entire before the case of *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 462, 29 Am. Rep. 184, was decided: *Smith v. Empire Ins. Co.*, 25 Barb. 497; and since then the superior court of the state has held such a contract entire: 45 N. Y. Super. Ct. 402.

The decision of *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 462, 29 Am. Rep. 184, is placed upon the fact that there was a separate valuation of the subjects of insurance. It is more reasonable, we think, to hold that the sole effect of the apportionment of the amount of insurance to the different subjects insured is to limit the extent of the insurer's risk, upon each item, to the amount named. It cannot be said to make a several contract as to each subject of insurance, for a consideration is necessary to each contract, and the consideration being in gross, there is no way to apportion it to the several contracts so as to sustain each by its proper consideration. It would not do to apportion it according to the amount of the risk upon the different items; for it is not true that the rates are uniform, but they vary according to the hazard of the risk.

This court, in the case of *Jackson v. Jones*, 22 Ark. 158, held a contract to sell fifteen hundred bushels of wheat at forty

cents per bushel to be an entire contract. There the subject of the contract was divisible, and the consideration apportionable; but the parties had manifested a desire to make one contract, and not fifteen hundred, and the court declined to substitute, by construction, other contracts for the one made by them. That contract was much more favorable to the contention of the appellee than the one we are considering. Undertakings of the appellee are divisible, and might be the subject of several contracts; but the consideration paid by the appellant was not divisible upon any basis disclosed by the contract, and there could not be a division into several contracts unless there could be an apportionment to each of its consideration.

Determined by the ordinary rules, this contract was entire. We see no reason why it should be determined by any other rule. As it was entire, the two houses comprised the premises, and so long as one of them was occupied, the policy was not suspended.

The judgment is reversed, and the cause remanded for a new trial.

FIRE INSURANCE—ENTIRETY OF THE CONTRACT. — As to when a contract of insurance covering two or more buildings is divisible, and when not, see *Loomis v. Rockford Ins. Co.*, 77 Wis. 87; *ante*, p. 96, and note.

APEL v. KELSEY.

[52 ARKANSAS, 341.]

PROBATE COURT, JUDGMENT OF, CANNOT BE COLLATERALLY ATTACKED. —

The probate court of Arkansas is a court of superior jurisdiction; all presumptions are in favor of its action; and all irregularities in the exercise of its jurisdiction, rightfully acquired, are cured by final judgment, and that is not open to collateral attack.

EXECUTORS AND ADMINISTRATORS—VALIDITY OF PRIVATE SALE OF LAND. —

Private sale of land of a decedent by his administrator, upon order of the probate court, for the payment of the decedent's debts, is not void when confirmed.

EJECTMENT by Kelsey to recover possession of land sold by an administrator at private sale, under order of the probate court, to pay the debts of the administrator's intestate. The sale was confirmed by the probate court, and a deed made to one Mills, under whom Kelsey claims. On the trial, the defendant, Apel, objected to the admission of the administrator's deed in evidence, and raised the question of the validity of the

private sale. His objections were overruled, and judgment rendered for plaintiff, and Apel appealed.

Bell and Bridges, for the appellant.

P. C. Dooley, for the appellee.

SANDELS, J. The jurisdiction of probate courts in the matter of sales of lands of deceased persons has often been the subject of investigation and decision by this court. It has often been held that the court is one of superior jurisdiction; that, as such, its judgments are proof against collateral attack; and that all irregularities, in the exercise of a jurisdiction once rightfully acquired, are cured by its final judgment. It is held that the court acquires jurisdiction of the *res* by the grant of administration, and that, upon the filing of a proper petition, the power to order a sale is absolute. It is in the exercise of this power that gross and palpable violations of the statute, courteously called "irregularities," most frequently occur. The court being of superior jurisdiction, all presumptions are in favor of the propriety of its action, and ordinarily no relief is attainable against its judgments and orders except by appeal. But no one can appeal except he have himself made a party to the proceeding in the probate court. When an administrator desires to sell land, he is required to give notice by publication of his intended application. This is to enable persons interested to make themselves parties, contest the application, if they see proper, and appeal from the order, if adverse to them. Yet it is held that failure to give such notice is but an irregular step in the exercise of jurisdiction, and is cured by confirmation. So it is required that publication be made of the time, place, and terms of such sale when ordered; but failure to give such notice is held to be an irregularity, which is cured by confirmation. Want of notice being but an irregularity, we are unable to see what additional "sanctity doth hedge about" a sale. The advantage of a public sale, when no one save the administrator knows the time when or place where it will transpire, is not evident.

It is impossible, upon principle, to distinguish the question here presented from those so often decided heretofore; and in obedience to the settled doctrine of this court, fixing the character of the probate court, and the effect of its judgments, we hold that a private sale of land by an administrator, upon order of that court, is not void when confirmed.

In this particular case there were no bad results to the estate of Hall from this method of sale. The land brought

a good price, and the administrators appear, in all things, to have acted capably and in good faith. But upon the occasion of holding this manifest violation of the law legalized by a subsequent order of confirmation, we think it proper to submit the following suggestions: —

The construction put upon the constitutional and statutory powers of the probate court has gone, we think, far beyond the intention of the framers of either constitution or statute. The accretions of power now far outweigh the original nucleus. But little further aggression is necessary to make the action of that court, in legal contemplation, infallible. This should not be. The specific powers granted these courts by law, pursued in the statutory method, are ample to accomplish the object of their being. The probate judges are not required to be, and usually are not, lawyers. In many instances they act without knowledge or consideration of the far-reaching effects of what they do. The most important interests, the guardianship of widows, children, and estates, are committed to their superintending care. Some, possibly, are dishonest; many are not wise or discriminating. Taking into account the magnitude of the property interests which they have in charge, these courts should be required to proceed in exact conformity to law, instead of being panoplied by the presumptions which attend the exercise of superior jurisdictions by other courts. When we see, day after day, the inheritance of infants squandered by the dishonesty or frittered away by the incompetency of administrators, and see these actions irrevocably legitimated by the approval of facile courts, we submit that it is time to call a halt.

The courts are now powerless. Former interpretations of the law have become rules of property, and cannot be overturned without uprooting the titles to one fourth of the property of the state. But as to future transactions, it is the power of the legislature to place its prohibition upon the sins of omission and commission in administration, which now bankrupt the estates of the dead, and send dependent widows to the work-house.

We earnestly commend the subject to the attention of the law-making power.

Affirmed.

JUDGMENTS OF PROBATE COURTS. — Judgments and decrees of courts of probate are not impeachable collaterally: *Klingensmith v. Bean*, 2 Watts, 486; 27 Am. Dec. 328; *McDade v. Burch*, 7 Ga. 559; 50 Am. Dec. 407. Compare also *Goodwin v. Sims*, 86 Ala. 102; 11 Am. St. Rep. 21.

WEAR v. GLEASON.

[52 ARKANSAS, 364.]

INNKEEPER — LIABILITY FOR BAGGAGE. — An innkeeper is not an insurer of the safety of baggage delivered to him to be held as a pledge for money loaned, or for accommodation, by a guest after he has severed his personal connection with the hotel by surrendering his room and paying his bill.

BAILMENT — LIABILITY FOR DELIVERY TO STRANGER. — A gratuitous bailee who delivers the subject of the bailment to an apparent stranger, without effort to verify the latter's claim to the property, and without inquiry as to its ownership, is liable to the real owner for the value of the goods.

ACTION by Wear, Boogher, & Co. against L. D. Gleason to recover the value of a trunk and contents left at the latter's hotel by one Boddy, the traveling salesman of plaintiffs. Boddy was a guest at defendant's hotel on August 19, 1887. After paying his bill he asked defendant for the loan of twenty-five dollars, leaving the trunk with him as security. Boddy then gave defendant a due-bill for the twenty-five dollars received, and defendant offered to give a check for the trunk, which was declined. Boddy gave defendant his railroad check for the trunk, and the latter sent and got it. Some days afterward a stranger called at the hotel, and pointing out Boddy's trunk, said it was his and that he wanted it sent to the railway baggage-room to be checked, whereupon defendant complied with his demand, and the trunk was not afterwards found. The court refused to instruct that the trunk was held by defendant as an innkeeper. Judgment for defendant, and plaintiff appealed.

U. M and G. B. Rose, for the appellants.

Sanders and Watkins, for the appellee.

Per CURIAM. There is no evidence to show that Gleason received the trunk in the capacity of innkeeper. Boddy had severed his personal connection with the hotel by surrendering his room and paying his bill, before the trunk was delivered to Gleason. It was subsequently delivered to him either under an understanding that it should be held as a pledge for money loaned by him to Boddy, or only for the accommodation of Boddy. In neither case would the extraordinary liability incident to the relation of innkeeper and guest arise: Bishop on Non-contract Law, secs. 1172, 1180.

If the defendant became a gratuitous bailee, or depositary

without reward, for the accommodation of Boddy, as the jury might well have found from the evidence, he was not answerable except for gross neglect. His only excuse for his failure to deliver, on demand, the trunk deposited with him was, that he had delivered it to a third person, who claimed it as his own. But by delivery to a third person, the bailee deals with the subject of the bailment in a manner not warranted by the understanding between the parties, and thereby commits a wrongful act, for which he becomes liable. As to whether an honest mistake by a gratuitous bailee in the identity of the owner, or of the property, made after the exercise of care on his part, would excuse him, is not presented by the facts in this case. The delivery by Gleason was made to an apparent stranger, without an effort to verify his claim to the property, and without inquiry as to its ownership. He thus manifested a culpable indifference to the safety of the property committed to his care, which, according to all the authorities which have come to our notice, makes him answerable for the value of the goods: *Schouler on Bailments*, secs. 117, 118; *Edwards on Bailments*, secs. 99, 162; *Nelson v. King*, 25 Tex. 655; *Dufour v. Mephram*, 31 Mo. 577; *Coykendal v. Eaton*, 55 Barb. 193; *Willard v. Bridge*, 4 Barb. 361.

In view of this fact, the evidence does not warrant the verdict, and the judgment will be reversed, and the cause remanded for a new trial.

INNKEEPERS — LIABILITY FOR BAGGAGE. — An innkeeper is only responsible for property lost at his inn when the party losing it was at the time a guest: *Towson v. Havre de Grace Bank*, 6 Har. & J. 47; 14 Am. Dec. 254; *Ingallsbee v. Wood*, 33 N. Y. 577; 88 Am. Dec. 409; and after a guest has given up his room and closed his connection with the inn, the innkeeper is liable only as a common bailee for baggage of the guest left behind: *McDaniels v. Robinson*, 26 Vt. 316; 62 Am. Dec. 574; *Miller v. Peeples*, 60 Miss. 819; 45 Am. Rep. 423. Compare note to *Cutler v. Bonney*, 18 Am. Rep. 135.

BAILMENTS — DELIVERY TO WRONG PERSON. — A misdelivery of property by any bailee to an unauthorized person is of itself conversion for which the bailor may maintain an action of trover: *Hall v. Boston etc. R. R. Co.*, 14 Allen, 439; 92 Am. Dec. 783.

ROBERTSON v. READ.

[52 ARKANSAS, 381.]

VENDOR AND VENDEE — EFFECT OF BOND FOR TITLE. — The effect of giving a bond for title, upon the sale of land, is to vest in the vendee the equitable title; and the return of the bond to the vendor by a third person, without the knowledge or consent of the vendee, and the destruction of his note for the unpaid purchase-money, will not extinguish his equitable title. Hence a subsequent purchase of the land by such third person from the original vendor only subrogates the former to the latter's rights, and he holds merely as mortgagee, and not as owner.

MORTGAGES — MORTGAGEE'S RIGHT TO COMPENSATION FOR IMPROVEMENTS, AND HIS LIABILITY FOR RENT. — A mortgagee in possession of land is not entitled to compensation for improvements made upon the mortgaged premises, further than is necessary to keep them in repair. He is not entitled to pay for permanent improvements made without the mortgagor's consent, and is chargeable with only such rent as the land would have yielded without the improvements.

W. S. McCain, and Wells and Williamson, for the appellant.

W. F. Slemons, for the appellees.

HEMINGWAY, J. This is a suit by the widow and heirs at law of one Bob Robertson, against Brass Robertson, his brother, to establish a trust in a tract of land.

The material facts of the case are as follows: In 1871 or 1872 one Thomas Trotter sold the land to Bob Robertson, on a credit, for \$660, giving his title bond, and taking notes for the purchase-money, bearing interest, until paid, at ten per cent per annum. Bob Robertson entered into possession and occupied the land as a homestead, Brass, who was younger, living with them. Bob paid \$160 on the notes. In 1874 he fled the country, leaving his wife, children, and brother in possession of the land. In 1875, after the last of the purchase-money notes had matured, Trotter notified Brass that unless they were paid he would proceed against the land. Brass procured the title bond from Bob's wife, and returned it to Trotter, who, intending to cancel the sale, destroyed it and the notes. The payment made by Bob liquidated the interest, but did not reduce the principal of his debt. Brass and Bob's family remained upon the land during 1875 as tenants of Trotter. About the close of that year Trotter sold the land to Brass. He paid part of the price in cash, and gave his notes for the balance; he received a bond for title. He subsequently paid the notes. It does not appear from the evidence that Brass acted otherwise than in good faith, either in attempting to cancel the bond to Bob, or to acquire title to

himself. When he purchased, there was due on Bob's notes \$660; and there were twenty acres of the land in cultivation, of the rental value of three dollars per acre per annum. The land is not shown to have had any other rental value. Brass subsequently cleared more of the land, and made other improvements; he asks that he be paid therefor in case his title fails.

The court below found that Brass had received assets from Bob to apply on his notes, which, with the rents received by him, was sufficient to extinguish them. As to such assets, the testimony is very indefinite and unsatisfactory, and we cannot find that any were received by Brass for that purpose.

The effect of the title bond to Bob was to vest in him an equitable title to the land, and to retain in Trotter the legal title as security for the purchase-money. The return of the bond to Trotter was made without Bob's knowledge or consent; such being the case, Trotter did not acquire Bob's title by its delivery to him and the destruction of the notes.

When Brass took possession under his purchase he held, not as owner, but as mortgagee, being subrogated to Trotter's right as such: *Teaver v. Eakin*, 47 Ark. 528.

A mortgagee is not entitled to be paid for improvements made upon the mortgaged premises, further than is necessary to keep them in repair. The improvements may be of permanent benefit to the estate, but unless made with the consent and approbation of the owner, no allowance can be made for them. The mortgagee has no right to increase the burden of redeeming. If he chooses to make improvements, he may enjoy their use during his possession, but upon redemption they inure to the benefit of the estate: *Jones on Mortgages*, sec. 1127.

A mortgagee who himself occupies the premises, especially if they consist of a farm, upon which money and labor must be bestowed to produce annual crops, is chargeable with such sums as are a fair rent of the premises: *Jones on Mortgages*, sec. 1122; but he should not be charged an increased rent caused by improvements upon the land, for which he is denied compensation. Justice is done by charging him with the rent which the land would have yielded as it was without his improvements. To the extent that the rental value is increased by them, he should not be held to account: *Jones v. Fletcher*, 42 Ark. 456; *Tatum v. McLellan*, 56 Miss. 352; *Jones on Mortgages*, sec. 1127, and cases cited.

The question of limitation was not raised by the pleadings of appellant, nor considered by us.

The appellees are entitled to redeem the lands upon paying to appellant the amount due on Bob's notes. He should be credited by the sum of \$660, the amount due on the notes when he purchased, less \$60, the rent for 1875, with interest from January 1, 1876, at ten per cent per annum; but he should be charged with the sum of \$60 for the rent of the land for each year, beginning with 1876, which should be credited at the end of each year on the amount due him. If the appellees pay the sum so due him, they are entitled to have the title vested in them; if they fail to pay it within a reasonable time, the land should be sold to satisfy it.

The judgment is reversed, and the cause remanded for a decree and proceedings thereunder in accordance with the law as herein declared.

MORTGAGEE IN POSSESSION, RIGHT TO IMPROVEMENTS.—A mortgagee in possession is entitled to compensation for only such improvements made upon the mortgaged premises as are necessary to keep the same in repair: *Gillis v. Martin*, 2 Dev. Eq. 470; 25 Am. Dec. 729; *Dewey v. Brownell*, 54 Vt. 441; 41 Am. Rep. 852.

RAILWAY v. DICK.

[52 ARKANSAS, 402.]

RAILROADS—LIABILITY FOR KILLING STOCK—BURDEN OF PROOF.—A railway company, by permitting cotton-seed to accumulate on or about its track, is under obligation to maintain reasonable care to prevent injury to stock attracted thereby, and if an animal is killed while feeding on such seed, the company must assume the burden of proving that it exercised reasonable care to prevent the killing.

ACTION to recover for the killing of an animal by a railroad train while such animal was feeding on cotton-seed on the railway company's track. A cotton-seed house was situated within two or three feet of the railway track, and in loading the seed from the house into cars belonging to the defendant company a considerable quantity of the seed had accumulated on the track. Judgment for plaintiff, and the defendant company appealed.

G. W. Shinn, for the appellant.

Per CURIAM. The company, having permitted cotton-seed to accumulate on or about its track, was under obligation to

maintain reasonable care to prevent injury to stock attracted thereby: *Jones v. Nichols*, 46 Ark. 207; *Kansas City etc. R'y Co. v. Kirksey*, 48 Ark. 366; *Crafton v. Hannibal etc. R. R. Co.*, 55 Mo. 580; *Page v. North Carolina R. R. Co.*, 71 N. C. 222.

The burden was upon the company to overcome the *prima facie* case of negligence made by the killing by showing that its servants had used the degree of care indicated by the charge to avert the injury. The proof does not show that state of case, and the judgment will be affirmed.

RAILROADS — BURDEN OF PROOF. — As to when and under what circumstances, in cases of stock killed by a railroad train, it devolves upon the company to show that it exercised reasonable care to avoid the killing, see note to *Philadelphia etc. R. R. Co. v. Anderson*, *post*, p. 000-000; *New Orleans etc. R. R. Co. v. Bourgeois*, 66 Miss. 3; 14 Am. St. Rep. 534; *Union P. R'y Co. v. Rassmussen*, 25 Neb. 810; 13 Am. St. Rep. 527; *Wilder v. Chicago etc. R'y Co.*, 70 Mich. 382; *Louisville etc. R'y Co. v. Smith*, 67 Miss. 15; *Molair v. Railway Co.*, 31 S. C. 510.

MARVIN v. MARVIN.

[52 ARKANSAS, 425.]

DIVORCE — MARRIAGE UNDER DURESS. — A man arrested on probable cause, and without malice, for seduction, who marries the woman to procure his discharge, cannot have the marriage avoided on the ground of duress, upon discovering that he could not have been convicted of the seduction.

ACTION for divorce. The facts appear from the opinion. Judgment for defendant, and plaintiff appealed.

Ed. H. Mathes, for the appellant.

PER CURIAM. If a man lawfully arrested on process for seduction marries the woman to procure his discharge, he cannot have the marriage avoided upon the ground of duress. The fact that he subsequently discovers that he could not have been convicted will not alter the case, if the prosecution was upon probable cause, and not merely from malice: *Bishop on Marriage and Divorce*, sec. 212; 2 Kent's Com. 453; *Honnett v. Honnett*, 33 Ark. 156; 34 Am. Rep. 39.

The prosecution of the appellant was upon probable cause. Let the decree be affirmed.

IN THE CASE of *Honnett v. Honnett*, 33 Ark. 156, 34 Am. Rep. 39, where a man who had seduced a woman was threatened by her brother-in-law, and informed that the community would lynch him if he did not marry the woman, but no bodily restraint or harm was placed upon him, and thereupon he did marry her, it was decided that he could not claim the marriage to be illegal on the ground of duress.

FORD v. JUDSONIA MERCANTILE COMPANY.

[52 ARKANSAS, 426.]

JURISDICTION, CONFLICT OF. — Where goods have been lawfully seized under attachment in a court of law, a chancery court, having no supervisory or appellate jurisdiction, has no power to order the goods delivered into the custody of a receiver appointed by it.

JURISDICTION, CONFLICT OF. — The custody and control of goods lawfully seized under attachment, by order of a court in the exercise of its jurisdiction, cannot be interfered with, except by a court of supervisory or appellate jurisdiction.

McRae and Rives, and J. W. House, for the appellants.

W. R. Coody, for the appellee.

HEMINGWAY, J. When the complaint was filed and the application to appoint a receiver presented, the property involved was in the custody of the sheriff, who had seized and held it under writs of attachment from the White circuit court against the property of the Judsonia Mercantile Company.

It appears from the complaint that the property belonged to the defendant in the writs; it was therefore rightly seized in obedience thereto. In this respect the facts differ from those presented in the case of *Willis v. Reinhardt*, 52 Ark. 128, in which we ruled that a stranger to an attachment might maintain replevin against an officer who seized his goods under a writ against the goods of the defendant in the suit.

The goods, belonging to the defendant in the writs, and being properly held by the sheriff thereunder, were in the custody of the court from which they issued, and under its control. The sheriff held them subject to the order of that court, and his possession could not be disturbed without interfering with that court in the exercise of its jurisdiction. But authority to do this appertains only to courts of supervisory or appellate powers, and as the chancery court has no supervisory control over the circuit court, it follows that it could not take this property from the sheriff into the custody

of its receiver. Such a practice would cause an unseemly clash of jurisdiction that should be exercised in perfect harmony; and there is neither reason nor authority to justify it: *Buck v. Colbath*, 3 Wall. 334; *Thompson v. Van Vechten*, 5 Duer, 618; *Veret v. Duprez*, L. R. 6 Eq. Cas. 329; *Hitchen v. Birks*, L. R. 10 Eq. Cas. 471; *Wilmer v. A. & R. R'y Co.*, 11 Myers Fed. Dec., sec. 300.

Such a bill might be entertained, if all parties representing the conflicting interests consented, by so draughting orders as to avoid the improper interference by one court with property in the custody of another. We are advised that such a practice has prevailed, and observation satisfies us that it has proven salutary; but it can only be approved where the consent of parties obviates the difficulty indicated.

The bill presents no other ground for equitable relief, and for the reasons indicated the demurrer to the complaint should have been sustained.

The judgment will be reversed, and the cause remanded, with direction to sustain the demurrer.

EQUITY JURISDICTION. — Chancery never interferes to arrest or set aside proceedings at law, or in other judicial tribunals, except when acting as an appellate court, upon the ground of legal error therein, unless prompted by conscience to prevent wrong and injustice: *Methodist P. Church v. Mayor etc. of Baltimore*, 6 Gill, 391; 48 Am. Dec. 540, and note.

RUSSELL v. TATE.

[52 ARKANSAS, 511.]

MUNICIPAL CORPORATIONS — MISAPPROPRIATION OF FUNDS. — A town council has no power, under the law of Arkansas, to appropriate corporate money to aid in building a county court-house to be located in such town.

MUNICIPAL CORPORATIONS. — OFFICERS OF CITY ARE TRUSTEES in managing and applying corporate funds; and their application of them to illegal purposes is a breach of trust, which may be enjoined in equity.

MUNICIPAL CORPORATIONS — REMEDY FOR ILLEGAL APPLICATION OF FUNDS. — After suit brought against a city council to cancel an illegal appropriation of corporate money, and also to cancel the warrant for the payment thereof, as well as to recover the money, the jurisdiction of the court cannot be ousted by the act of the council in canceling the unpaid warrant.

MUNICIPAL CORPORATIONS — REMEDY FOR MISAPPROPRIATION OF CORPORATE FUNDS. — Tax-payers may maintain suit in equity against towns and their officers to prevent the misapplication of the corporate funds, and the relief granted may be either injunctive or affirmative.

MUNICIPAL CORPORATION — REMEDY FOR MISAPPLICATION OF CITY FUNDS.

— Where a city council has abused its discretion in voting away the city funds, this amounts to a conversion of trust funds, for which each of its members, and also the mayor who ordered and the treasurer who made the payment, are liable.

SUIT in equity by certain tax-payers of the town of Russellville against the appellants, the city council of that place, to enjoin the payment of an order upon the treasurer, and to have restitution of certain moneys paid out. The city council consisted of a mayor, treasurer, and five aldermen, all of whom were present at a meeting, when a resolution was adopted that one thousand dollars of the city money be appropriated to aid in the construction of a county court-house, to be located in the town, and that the mayor be instructed to draw his warrant on the treasurer for that sum in favor of the building committee. The mayor thereupon drew two warrants, one for \$675, which was paid the same day, and another for \$325, which was not paid, for want of funds. Defendants, after the institution of suit, called in and canceled the outstanding warrant, and moved to dismiss the temporary injunction already granted; but this motion was denied. They then demurred to the complaint, on various grounds; but the demurrer was overruled, and after judgment for plaintiffs, as prayed for in the complaint, the defendants appealed.

Wilson and Granger, and G. W. Shinn, for the appellants.

J. G. Wallace, for the appellees.

SANDELS, J. An analysis of the case shows six questions for decision: 1. Has equity jurisdiction as to the matters stated in the bill? 2. Are residents and tax-payers proper parties plaintiff? 3. May affirmative as well as injunctive relief be had in such a proceeding? 4. Was the appropriation of the one thousand dollars by the council valid or void? 5. Are aldermen, as such, liable to an action for votes given upon measures before them? 6. What liability, if any, did the mayor, ordering the treasurer making and the council receiving the payment, incur by reason of this transaction?

The so-called appropriation was a nullity: *Jacksonport v. Watson*, 33 Ark. 704; *Sykes v. Mayor*, 55 Miss. 115; Const., sec. 5, art. 12; *Minot v. West Roxbury*, 112 Mass. 1; 17 Am. Rep. 52.

The officers of the city are trustees in the management and application of the funds and property of the people of the city:

2 Dillon on Municipal Corporations, 915. The application of municipal funds to illegal purposes by them is a breach of trust: 2 Dillon on Municipal Corporations, 919, and notes. Equity has jurisdiction to prevent the misapplication or waste of trust property: 2 Story's Eq. Jur. 1252, and note. The fact that after the suit was brought the city council recalled and canceled the unpaid warrant did not oust the jurisdiction of the court. That was but part of the purely equitable relief demanded. It was desired to prevent its reissue and cancel the appropriation. Besides, under our chancery system, had the cancellation of the warrant been the only original ground of equity jurisdiction, it was not lost: *Price v. State Bank*, 14 Ark. 50.

Suits by tax-payers against towns and their officers, to prevent or remedy misapplication of town funds, are not only allowed by statute, but it is the prevailing doctrine in America that tax-payers may maintain them, in the absence of statute. Their relations to the municipality are analogous to those of stockholders to a private corporation: Mansfield's Digest, sec. 929; *Jacksonport v. Watson*, 33 Ark. 704; *Crampton v. Zabaskie*, 101 U. S. 601; 2 Dillon on Municipal Corporations, 914, 915; *Blakie v. Staples*, 13 Grant (U. C.) 67, cited in note on p. 902, 2 Dillon on Municipal Corporations.

There is no foundation in the authorities for the claim that the power of chancery is only injunctive. It would be a reproach to justice if it were true. In the present case the appropriation was made, the warrant was drawn, and the money paid by the treasurer, before an attorney could have comprehended the situation, and have written the caption of a complaint. Chancery has ample power to prevent further wrong and require reparation for that which has been done: 2 Story's Eq. Jur. 1252, and notes; *Frost v. Belmont*, 6 Allen, 152; *Citizens' Loan Ass'n v. Lyon*, 29 N. J. Eq. 110; *Attorney-General v. Poole*, 1 Craig & P. 17; *People v. Fields*, 58 N. Y. 491; *Attorney-General v. Boston*, 123 Mass. 460; *Attorney-General v. Dublin*, 1 Bligh, 312; 2 Dillon on Municipal Corporations, 909-912.

As against the liability of these defendants, it is contended that a city council being in some sort a legislative body, its members are not liable for the erroneous exercise of their discretion in voting upon measures before them. This is true: *Jones v. Loving*, 55 Miss. 109; 30 Am. Rep. 508; *Freeport v. Marks*, 59 Pa. St. 253.

But where, after exercising their discretion in voting one

thousand dollars of the money of the town to pay an obligation which they and a few others had bound themselves to discharge, they or their building committee took the money, it was a conversion of trust funds for which each of them, as also the mayor who ordered and the treasurer who made the payment, are liable: *Frost v. Belmont*, 6 Allen, 152; *Citizens' Loan Ass'n v. Lyon*, 29 N. J. Eq. 110; *Attorney-General v. Poole*, 1 Craig & P. 17; *Attorney-General v. Wilson*, 1 Craig & P. 1; *Blakie v. Staples*, 13 Grant (U. C.) 67.

The vote of confidence given appellants at the next ensuing city election does not affect their liability to repay the money which they took from the city treasury.

Affirmed.

MUNICIPAL CORPORATIONS CAN EXERCISE NO POWERS except such as are directly or impliedly conferred upon them by the law creating them: *St. Louis v. Bell Tel. Co.*, 96 Mo. 623; 9 Am. St. Rep. 370; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435; *Parish of Ouichita v. City of Monroe*, 42 La. Ann. 782; and compare *Village of Carthage v. Frederick*, 122 N. Y. 268; 19 Am. St. Rep. 490, and note.

MUNICIPAL CORPORATIONS — INJUNCTIONS. — Owners of taxable property can enjoin the illegal acts of municipal officers, when such acts will increase the municipal taxes: *Newmeyer v. Missouri etc. R. R. Co.*, 52 Mo. 81; 14 Am. Rep. 394, and note; *English v. Smock*, 34 Ind. 115; 7 Am. Rep. 215; *Little v. Jayne*, 124 Ill. 123.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

[IN BANK.]

LOAIZA v. SUPERIOR COURT OF SAN FRANCISCO.

[85 CALIFORNIA, 11.]

VENDOR AND VENDEE — JURISDICTION TO CANCEL CONTRACT OF SALE OF LAND IN FOREIGN COUNTRY FOR FRAUD.— The courts of California have jurisdiction to set aside a contract between non-residents for the sale of mining property in Mexico, on the ground of fraud, and to cancel notes and mortgages given as part consideration, when it appears that such contract was made in California, the purchase-money paid and invested in that state, and the notes and mortgages given by a citizen of that state and made payable to a resident thereof; nor is it any objection to the relief sought, when all the parties are within the jurisdiction of the court, that the property is to be restored to the vendor in accordance with the laws of Mexico as a condition precedent to equitable relief.

VENDOR AND VENDEE — RESCISSION OF CONTRACT — JURISDICTION. — In an action to compel the vendor to restore the consideration, resting in executory contracts, fraudulently received, and which is still within the state, under a contract between non-residents for the sale of property in a foreign country, but made within the state, the state courts have jurisdiction to rescind such contract and restore the consideration, although the vendor has not been personally served with process, and has not submitted himself to the jurisdiction of the court, except through service by publication.

VENDOR AND VENDEE — VALID CONTRACT TO PURCHASE — RESCISSION. — To a valid contract to purchase land, there must be parties capable of contracting, consent, a lawful object, and sufficient consideration. The consent must be free, mutual, and communicated by one to the other, and not induced by fraud, undue influence, or mistake, or it may be rescinded by either party without the consent of the other.

VENDOR AND VENDEE. — EXECUTORY CONTRACTS, GIVEN AS CONSIDERATION for the purchase of land in a foreign country, may be rescinded for fraud, according to the laws of the state where they were made and were to be executed, and such consideration, when within the jurisdiction of

the court, returned to the vendee, notwithstanding the non-residence of the parties to the contracts; nor is their mutual consent necessary to rescission.

VENDOR AND VENDEE — RESCISSION OF CONTRACT FOR FRAUD — REMEDY OF VENDEE. — Where a purchase has been induced by fraud, an offer by the purchaser to restore everything of value received under the contract of purchase, whether accepted or not, if followed with prompt and proper notice of rescission, completes the rescission, and the vendee may then seek the aid of a court to compel the return of the purchase-money still within its jurisdiction, notwithstanding the non-residence of the vendor, and that the land agreed to be purchased is situated in a foreign country.

VENDOR AND VENDEE — RESCISSION OF CONTRACT — RECEIVER. — A court having jurisdiction to rescind a contract of purchase for fraud, and to restore the purchase-money paid thereunder, which is still within its jurisdiction, has power to appoint a receiver of such money, to preserve it and retain it within the jurisdiction of the court, until the rights of the parties are adjudicated.

Page and Eells, P. G. Galpin, Wilson and Wilson, E. W. McKinstry, and Stanly, Stoney, and Hayes, for the petitioner.

William F. Herrin, and R. S. Mesick, for the respondent.

Fox, J. This is a proceeding for a writ of review to set aside certain proceedings in the superior court of the city and county of San Francisco, Levy, J., in an action there pending, wherein the Oro Grande Company, Limited, and the Globe Mining Syndicate, Limited, are plaintiffs, and Manuel Aguayo, Leocadio Aguayo, and W. Loaiza, are defendants, and in which action such proceedings have been had as that orders for injunction *pendente lite*, and appointing a receiver, have been made, the plaintiff here claiming that in that case the court had no jurisdiction for such proceeding, and praying that the orders aforesaid be vacated and set aside.

In the action whereof the proceedings are sought here to be reviewed, both the plaintiffs are foreign corporations organized under the laws of and resident in England, and the defendants Manuel and Leocadio Aguayo are both citizens and residents of the republic of Mexico, absent from this state, the defendant Loaiza (plaintiff herein) being the only one of all the parties residing in this state, and the complaint showing upon its face that he is a simple stake-holder in the premises. The relief sought is in favor of artificial persons resident in England, and against natural persons citizens and resident in Mexico. As between such parties, it being conceded that personal service of process has not been made upon any of the defendants except Loaiza, and that he is a mere stake-

holder, it is claimed that the courts of this state have not and can have no jurisdiction. And the whole question to be resolved in this proceeding is that one of jurisdiction. If the court has jurisdiction, then the errors, if any, which have been or may be committed, are reviewable only on appeal.

Looking into the record, which has been sent up on return to the writ issued herein, the following facts, briefly stated, appear, — it being understood that no answer has been made to the complaint filed in the court below, and that for the purposes of this proceeding the allegations of the complaint, affidavits, and deposition filed are necessarily taken as true: —

In 1887-89, the defendants Manuel and Leocadio Aguayo, brothers, were partners, owners, and in possession of certain mining properties and other adjuncts thereto, situate in the state of Sonora, in Mexico, and bonded the same for sale; that during this period of time, and with a view to effecting sale thereof, certain mining experts were called upon to make, and did make, an extensive and critical examination of the mines and mining property, as a basis for and upon the basis of which they made reports as to the character and value of the properties; that, they were engaged for several weeks in taking samples of earth, rock, and ores from the mines, and making assays thereof; that during all the time they were engaged in taking such samples, the Aguayos, for the purpose of insuring high-grade returns from the assays, and thus securing a sale of the mines at a price largely in excess of their true value, persistently, willfully, secretly, and fraudulently, and without the knowledge of the experts, tampered with the samples taken, and mixed with them large quantities of fine gold, — or in the language of the miners, "salted the samples," or caused the same to be done, — so that they fraudulently procured grossly exaggerated reports to be made as to the character and value of the mines, and that, too, without the knowledge of the experts who conducted the examinations and made the reports; that, deceived and misled by the false and fraudulent reports so fraudulently procured and caused to be made, and relying upon the truth thereof, the plaintiffs (the corporations above named), in September, 1889, were induced to purchase, and did purchase, said mines and properties from said Aguayos, at and for the price of one million five hundred and seventy-five thousand dollars, depositing therefor in escrow, in San Francisco, seven hundred and ten thousand dollars, in gold coin, and the promissory notes of

Alvinza Hayward, a citizen of California, payable at future days, with interest at six per cent per annum, and secured by mortgage upon real estate situate in San Francisco, to the amount of eight hundred and sixty-five thousand dollars, all of which was subsequently delivered, in pursuance of the conditions of the deposit, and upon receipt of information that possession of the mining properties had been delivered, to the defendant Loaiza, who received the same as the agent and representative of the defendants Aguayos; that these notes and mortgages, and nearly all the money, or its immediate representative in securities in which the same had been invested by Loaiza for account of the Aguayos, remained in the hands of said Loaiza, held for the benefit and account of the Aguayos, and within the jurisdiction of the courts of California, until the commencement of this suit in the superior court, when the transfer thereof pending suit, or the removal of the same beyond the jurisdiction of the court, was enjoined by order of the court, and a receiver was appointed to take possession thereof, and hold the same until the further order of the court. The plaintiffs in said suit, purchasers of the mining properties, did not discover the fraud which had been perpetrated upon them until within one month prior to the bringing of the suit. Promptly upon discovering these frauds, they notified the Aguayos in writing that they "did rescind said purchase and sale," and demanded of said Aguayos "a rescission of the said purchase and sale," and then offered to restore to said Aguayos all the properties which had been conveyed to them, and everything of value which they had received from them, and to surrender the possession of all said properties, and to do and perform all acts and things which might be necessary or proper in order to fully restore to said Aguayos all properties and things of value received from them, as fully and completely as if said purchase and sale had never been made, upon condition that said Aguayos should restore the moneys and things of value received as the consideration for said purchase and sale.

This demand and offer being rejected, a bill in equity was promptly filed, setting out the facts, renewing the offer, and praying a decree of rescission and of restoration of the moneys and things of value received by defendants from plaintiff as the consideration for such purchase and sale, an injunction, pending the action, to restrain the transfer of said moneys and securities, or the removal thereof beyond the jurisdiction of

the court, and the appointment of a receiver, pending the action, to take charge of and hold said moneys and securities.

1. It is claimed in argument that this contract was made in Mexico, and can only be rescinded in and according to the laws of Mexico, and that no court has jurisdiction to adjudge a rescission thereof except the courts of Mexico.

There is no more in the record to indicate that this contract was made in Mexico than there is that it was made in England, except that the mere act of delivering possession of the property sold was of necessity done in Mexico. The internal evidences furnished by the record all tend to show that the entire contract of purchase and sale was made in San Francisco. There the deposit in escrow was made of everything that was to be given in consideration of the purchase and sale pending actual delivery of possession. There the consideration was finally delivered to and received by the agent of the Aguayos, and there the consideration remained, invested and seeking investment, until impounded by the court at the suit of the parties defrauded into its delivery. The larger part of that consideration consisted of the promissory notes of a citizen of California, made and payable in California, and to a resident of the state (for all the notes were payable to the defendant Loaiza), and secured by mortgage of property in said state, made and executed by the maker of the notes, and recorded in said state. These were certainly executory contracts; and if they could be rescinded at all, it could be done in and according to the laws of the state where made, and where they were to be executed.

2. It is also insisted that the court in which said proceeding in equity was instituted has no jurisdiction, because the aid of the courts of this state cannot be successfully invoked in favor of non-resident foreign corporations, against non-resident foreigners, in an action affecting in any way title to lands in a foreign state.

The unsoundness of this position grows out of the assumption that the object of the action is to compel the Aguayos to accept reconveyance and restoration of the properties in Mexico. Such is not the fact. The real object of the action is to compel the restoration to plaintiffs of so much of the consideration which they were fraudulently induced to give for these properties as may be within the reach of the compulsory power of the court, and for the rescission and cancellation of the executory contracts (the notes and mortgages) procured by the

frauds aforesaid, they being confessedly within the jurisdiction of the court. This relief can only be given in equity, and will be given only upon the condition prescribed by the statute and offered by the plaintiffs, — that of restoration by the plaintiffs of the property for which the consideration was given. As to the lands, the plaintiffs are to be the actors; the defendants are to be given the opportunity to receive. The plaintiffs have voluntarily submitted themselves to the court, offering to do equity, — entitled to relief only as they do equity, and bound to obey the mandate of the court as a condition of receiving the relief which they seek. The non-residence of plaintiffs is not material to the maintenance of the action. They have submitted themselves to the jurisdiction of the court by becoming suitors before it. They are amenable to its process, and must obey its commands before they can obtain relief. If conditions are attached to the relief awarded them, then performance by them can be compelled: *Cleveland v. Burrill*, 25 Barb. 532.

Such voluntary appearance and submission made through the officers of the court — the attorneys at law — would be sufficient to enable the court to enforce the performance of an act imposed as a condition of relief; but in this case the plaintiffs are not here by simple representation by counsel. The record shows that they seek the equitable interposition of the court, and in court make the offer of restoration on their part required by our statute, in person, through the person of one of their own directors resident within the jurisdiction, and by them made managing director, and their attorney in fact. Through him they not only make the offer, but through him they give all the securities that the court requires — and they are proportionate to the interests involved — for the protection of the defendants.

This point, like the next one which will be noticed, is argued as if the object of the action was to compel a reconveyance of the lands in Mexico, and it is only by supposing that such is the object of the action that the cases cited in support of the argument can be held to be in point. But such is not the object of the action. If the parties were reversed, and the Aguayos were suing the English companies for reconveyance and redelivery of possession, on the ground of frauds committed by the English companies, resulting in a failure of consideration, then some of the authorities cited would support the proposition that the court here would have no jurisdiction

to enforce its decree for a reconveyance and redelivery of property in Mexico, unless it first got jurisdiction over the persons of the defendants. The object of this action is to have the court use its compulsory process only to affect property within its jurisdiction, and then only upon the party seeking the aid of this process, voluntarily, or in compliance with conditions which the court may impose, personally, and in accordance with the laws of Mexico, doing whatever may be necessary to restore title and possession of the property there situate.

Counsel have cited numerous authorities in support of their argument in this behalf. We refer to a few of those upon which most reliance seems to be placed, by way of showing the distinction between the cases cited and the one here under consideration, and the reason why the rule there established does not apply to the present case.

Smith v. Mutual Ins. Co., 14 Allen, 336, was an action brought in Massachusetts by a citizen and resident of Alabama against a life insurance company of New York to compel the latter to restore to him certain rights under a policy of insurance upon his life, which the company claimed had been forfeited. This was an action *in personam*, pure and simple. There was neither person nor property in Massachusetts to be affected by the judgment. All the relief sought was to compel action of a certain kind on the part of a non-resident foreigner, and in a foreign country. The court properly held that it had no power to enforce such a judgment, and consequently no jurisdiction to render one. The case bears no relation to the one here under consideration.

Great stress is laid upon *Matthaei v. Galitzin*, L. R. 18 Eq. 340, in this connection. That case was brought by the plaintiff, a foreigner, against the Princess Galitzin, also a foreigner, for an accounting of profits made in the working of a mine in Russia, the mine being operated by an English company, which was a mere stake-holder in the premises, and made a defendant solely for the purpose of preventing the payment of the profits over to the princess until the accounting was had, — the plaintiff claiming that he was entitled to share in the profits by way of commission. The action was purely *in personam*, whether it involved the matter of accounting between plaintiff and the princess, or included the settlement, as preliminary thereto, of the question of whether or not the plaintiff was entitled to a commission as claimed. The contract relied upon was confessedly made in a foreign

country, in relation to foreign property, between parties both of whom were foreigners, and all rights and liabilities under it were personal. We fail to perceive how the case has any bearing upon the questions involved in this case. The conclusion of the court was, that "a foreign resident abroad cannot bring another foreigner into this court respecting property with which this court has nothing to do." That is not this case. Here the parties are brought into court to cancel a contract made and to be executed in this jurisdiction, — the notes and mortgage, — and in relation to property which is subject to the jurisdiction of the court. It is not proposed that the judgment of the court shall make the defendants actors in the disposition of property beyond its jurisdiction, or appoint anybody to act for them in the disposition of such property.

We are cited, also, to an opinion by an able jurist, Mr. Justice Sharswood, in *Coleman's Appeal*, 75 Pa. St. 442. We have carefully examined that case, and as we read it, only these points are decided, having any bearing upon the questions here involved: 1. That what is called a foreign attachment in that state will not lie for a demand founded in tort; that was a matter purely of statutory regulation, as it is here. 2. That in cases where attachment will lie against a non-resident foreign defendant, the judgment can only be enforced against the property of defendant found within the jurisdiction, unless the defendant has been personally served within the jurisdiction, or has voluntarily appeared; but upon such service or appearance, the proceeding against him may end in a judgment which will bind him personally, and may follow and be enforced against him extraterritorially. 3. "Where the claim of plaintiff is for goods or land [within the jurisdiction] in the constructive possession of a non-resident, by his agents or tenants, he has his remedy by writ of ejectment for the land, or by writ of replevin for the goods, in like manner summoning the person in possession as defendant." 4. In equity, "in cases where persons interested are out of the jurisdiction of the court, it is sufficient to state the fact in the bill, and pray that process may issue on their return. . . . The power of the court to proceed to a decree in their absence will depend on the nature of their interest, and the mode in which it will be affected by the decree. . . . If they are to be active in performing the decree, or if they have rights wholly distinct from those of the other parties, the court, in their absence, cannot proceed to a determination against them."

5. That "though it is an undoubted principle that wherever a court of equity has jurisdiction it will go on to make a complete decree, so as to settle the entire controversy between the parties, . . . any subject of property within its reach will [not] give it jurisdiction of the person of a non-resident defendant, so as to authorize . . . a personal decree against him, if he does not appear, for the payment of money." And after some further consideration, it concludes that branch of the discussion with the words: "We are of opinion that the bill must be confined, at least so far as the interest of the foreign defendant is concerned, to a prayer for a decree affecting only the property in question."

There is nothing in these conclusions, or in the reasoning of the learned justice which leads up to them, tending to show that the court whose action is now under consideration has not jurisdiction to proceed in the action before it, and grant the relief prayed, so far at least as it affects the property within this jurisdiction. As to that property, the defendants will not be called upon to be active in enforcing or carrying into effect the judgment of the court. It may be that no personal judgment can be entered against them on account of moneys which they have secured, which could be enforced against them in the country of their residence; but it can be adjudged, if the proofs shall warrant it, that the consideration paid for the property in Mexico was procured to be paid by fraud, and so much of the money and property as remains within this jurisdiction and has been impounded by the court can be delivered up, and the securities and executory contracts requiring further payment to be made be canceled, without any conflict with the principles laid down in the case cited.

We are also cited to *Norris v. Chambers*, 29 Beav. 246, and *Cockney v. Anderson*, 31 Beav. 452. Neither of these cases is in point. In the former, the English court sustained a demurrer on two grounds: 1. That there was no privity of contract between the parties plaintiff and defendant; 2. That the purpose of the bill was to decree a lien upon real property situate in Germany. In the other, the reason for holding that there was no jurisdiction was because the purpose of the action was to administer and wind up a trust created under a contract made in a foreign country, by foreigners, to be executed wholly in that country, and in relation to property there situate. Neither of the cases is at all parallel to the one here under consideration.

Nor is the case of *Moseby v. Burrow*, 52 Tex. 396, in point. No decree is sought in this case compelling the defendants to make conveyance of lands in Mexico. If any conveyance of that land is required, it will be required of plaintiffs, who have submitted themselves to the jurisdiction of the court, and as a condition of granting the relief which they seek.

3. Dropping the element of non-residence of plaintiffs, the petitioner here still insists, and the argument, even under other heads, is mainly directed to this proposition, that the court has no jurisdiction, by reason of the non-residence of the defendants Aguayos, and of the fact that personal service has not been and cannot be made on them within the state.

The cases already considered are leading ones among those urged in support of this proposition. Added to them are many others, such as *Belcher v. Chambers*, 53 Cal. 635, *Anderson v. Goff*, 72 Cal. 73, 1 Am. St. Rep. 34, *Pennoyer v. Neff*, 95 U. S. 714, and others of that class, all of which discuss the question of the power of the court to render judgment in actions purely *in personam*, without personal service or appearance of the defendant; or others, like *Hart v. Sansom*, 110 U. S. 155, where the decree was to operate against the defendant *proprio vigore* to annul a deed or establish a title, or to compel the defendant personally to be an actor in the performance of some act prescribed by the decree, whether he desired to perform it or not. It is conceded that the court would have no power to render a decree in such cases and of such a character in the absence of the defendant, unless there had been personal service of process within the jurisdiction to which the court could send its process.

But all this argument is based upon a misapprehension of the character and object of the action here under consideration, and of the relation of the parties to each other at the time of the commencement of the action.

To a correct understanding of the object of the action, and of the question of the right to maintain it, we must first correctly understand the relation of the parties to each other.

The record does not bear out the proposition insisted upon on behalf of the petitioner here, — that they are simply persons who were parties to an executed contract which was made and executed in Mexico. The preponderance of the evidence furnished by the record is in favor of the proposition that the contract of purchase and sale was made in San Francisco, within the jurisdiction of the courts of California. One

act in its performance was necessarily performed in Mexico, — that of the delivery of the property sold. But that was not the last act in the performance of that contract. The entire consideration of the sale was subsequently delivered, and that delivery took place in San Francisco. It consisted in the delivery of money, and of new contracts, — executory contracts, — to be performed in the future, which have not yet been performed, and performance of which is not yet due. These have always been, and still are, within the jurisdiction of our courts. These moneys and executory contracts were delivered in consideration of what is claimed to have been a contract of sale on the part of the Aguayos, now fully executed. But was that a contract at all? In this state, and until the contrary appears it will be presumed to be the same in Mexico, it is essential to the validity of a contract that there should be, — 1. Parties capable of contracting; 2. Consent; 3. A lawful object; and 4. A sufficient cause of consideration: Civ. Code, sec. 1550. To be consent, it must be free, mutual, and communicated by each to the other: Civ. Code, sec. 1565. It is not free when obtained through fraud, undue influence, or mistake: Civ. Code, sec. 1567. If not free, it may be rescinded by the parties in the manner prescribed by the chapter on rescission: Civ. Code, sec. 1566. Consent is deemed to have been obtained by fraud, undue influence, or mistake, when it would not have been given had such cause not existed: Civ. Code, sec. 1568.

The record shows that the consent of the purchasers to make this purchase, and deliver these moneys and securities in consideration thereof, was procured by fraud on the part of the Aguayos, and mistake on the part of the other parties, induced by such fraud, and that it would not have been given had not such cause existed. It therefore shows that there was no valid and binding contract between the parties, and that, such as it was, it might be rescinded by the parties. The acts of fraud are set out, and they show actual fraud, within the meaning of section 1571 of the Civil Code. It was a misrepresentation of the value of property, knowingly made, and entitled the purchaser to a rescission: *Cruess v. Fessler*, 39 Cal. 336; *Bank of Woodland v. Hiatt*, 58 Cal. 234. Having been induced to enter into this contract by fraud, and through mistake induced by such fraud, the parties could either ratify the same and sue for damages, or rescind: 1 Wharton on Contracts, sec. 282; 2 Addison on Contracts, sec. 1218; *Alvarez v. Bran-*

nan, 7 Cal. 503; 68 Am. Dec. 274; *Pence v. Langdon*, 99 U. S. 578; Civ. Code, sec. 1689; *Burke v. Levy*, 70 Cal. 254; *Fish v. Benson*, 71 Cal. 440; *Colton v. Stanford*, 82 Cal. 398.

If the suit were for damages, it could not succeed and end in a judgment which could be enforced against the persons of defendants without personal service or appearance. But it is not for damages. It is upon and after rescission, and to enforce rescission, so far as the means of enforcing it are within the jurisdiction of the court. It does not require mutual consent of the parties to rescind. Under section 1689, either party may rescind when consent was given by mistake or obtained by fraud. According to the record, the purchasers did actually rescind, and rescind promptly, before the action was brought, and did all that is required of them by section 1689, which gives them the right, and section 1691, which prescribes the mode of rescission. They did not restore, because restoration was not accepted; but they offered to restore, and in the action they again offer to restore, everything of value received by them under the contract. This offer, with the prompt and proper notice, makes the rescission complete, and entitles them to the aid of a court of competent jurisdiction in securing to them the results and fruits of the rescission. To secure those results and fruits is the object of the action they have brought. Those results and fruits are the restoration of the moneys and things of value which they gave in consideration of the purchase. Most of those moneys, or the securities in which they have been invested, and the other things of value which were so given, are all earmarked, so that they can be traced and identified, and were within the jurisdiction and are now within the possession of the court in which the action was brought. That the court has jurisdiction to afford the relief sought is supported by ample authority: See cases already cited, and *Fratt v. Fiske*, 17 Cal. 380; *Watts v. White*, 13 Cal. 321; *Morrison v. Lods*, 39 Cal. 381; *Barfield v. Price*, 40 Cal. 535; *Herman v. Haffenegger*, 54 Cal. 161; *Marston v. Simpson*, 54 Cal. 189; *Fitz v. Bynum*, 55 Cal. 459; *Henderson v. Hicks*, 58 Cal. 364; *Collins v. Townsend*, 58 Cal. 608; *Hart v. Kimball*, 72 Cal. 283; and *Dunn v. Daly*, 78 Cal. 640,—in all of which this right of rescission upon offer to restore is recognized. We concede, as claimed by petitioner, and decided in *Bohall v. Diller*, 41 Cal. 532, that the rescission must be *in toto*, and in this case it seems to have been so; the offer was to restore every-

thing of value on the one side, and the demand that everything be restored, on the other. The offer must be made good whenever the demand is complied with.

Incidentally, some authorities have already been cited tending to sustain the jurisdiction of the court in cases of this kind. The following may be referred to, in addition:—

In *Rourke v. McLaughlin*, 38 Cal. 196, this court holds that specific performance in equity will be decreed whenever the parties or the subject-matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court, and cites the case of *Penn v. Lord Baltimore*, 1 Ves. 144, where specific performance of a contract for lands in America was decreed in England; and *Ward v. Arredondo*, Hopk. Ch. 213; 14 Am. Dec. 543,—a case in many respects parallel to the one here under consideration, and in which the jurisdiction of the court was sustained.

In *Boswell's Lessee v. Otis*, 9 How. 348, the supreme court of the United States says: "Jurisdiction is acquired in one of two modes: 1. As against the person of the defendant, by the service of process; or 2. By a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by attachment or by bill in chancery."

In *Cooper v. Reynolds*, 10 Wall. 318, the same court held, in a case where there was no personal service, and the defendant was not within the territorial jurisdiction of the court, that the seizure of the property or the levy of the writ of attachment on it was the one essential requisite to jurisdiction, and that it unquestionably made the proceeding purely *in rem*.

In *Galpin v. Page*, 3 Saw. 124, Mr. Justice Field held that proceedings which are in form personal suits, but which seek to subject property brought by existing lien, or by attachment, or by some collateral proceeding, under the control of the court, and those which seek to dispose of property or relate to some interest therein, but which touch the property or interest only through the judgment recovered, while not strictly proceedings *in rem*, so far as they affect property in the state, are treated substantially as such proceedings.

In *Pennoyer v. Neff*, 95 U. S. 727, which has become the leading case on the subject of jurisdiction acquired by publication, the supreme court of the United States says: "Sub-

stituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants,—that is, where the suit is merely *in personam*,—constructive service in this form upon a non-resident is ineffectual for any purpose.”

In *Windsor v. McVeigh*, 93 U. S. 279, where the same question was considered, the court says: “The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will therefore operate to impart notice to him.”

The same principle is sustained in *Heidritter v. Elizabeth Oil Co.*, 112 U. S. 301, where the court adds to what had been said before, that jurisdiction may be acquired by the mere bringing of the suit in which a claim is sought to be enforced against property situate within its territorial jurisdiction; that this may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit.

Even in the case of *Arndt v. Griggs*, 134 U. S. 316, cited by petitioner, the court says: “It [the state court] cannot bring the person of a non-resident within its limits,—its process goes not out beyond its borders,—but it may determine the extent of his title to real estate within its limits, and for the purpose of such determination may provide any reasonable method of imparting notice.”

If the state court has such power with reference to title to real estate held by a non-resident, how much the more will it

have the same with reference to personal property situate within its jurisdiction? And the real and primary purpose of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind, and did rescind, upon discovery of the fraud.

Our statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it: Civ. Code, sec. 2224. This being so, it cannot be that the arm of equity is so short or so weak that the fraudulent trustee,—he who has become trustee by fraud,—by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded *cestui que trust*.

That the court has such jurisdiction as is here claimed for it is fully sustained in *Felch v. Hooper*, 119 Mass. 52, where the case is clearly distinguished from that of *Spurr v. Scoville*, 57 Mass. 579, cited by petitioner; in *National Exchange Bank v. Stelling*, 32 S. C. 102; in *Quarl v. Abbett*, 102 Ind. 233; 52 Am. Rep. 662; in *King v. Vance*, 46 Ind. 251, where the court says: "The defendant may be brought in by publication; and when thus notified, a defendant is before the court for all purposes except the rendition of a personal judgment"; and in *Martin v. Pond*, 30 Fed. Rep. 15, where Mr. Justice Brewer says: "It may be conceded that notice to the defendant is necessary to divest him of his rights and interests, but the publication is notice; it is equivalent to the personal service of summons."

4. It is specially insisted on the part of petitioner that the court had no jurisdiction to appoint a receiver; but the argument in support of that contention is based almost entirely upon the proposition that the court has no jurisdiction generally. If it has general jurisdiction in the case, as we conclude that it has, then error in the exercise of that jurisdiction would be reviewable only on appeal. The appointment of a receiver, however, might in some cases be more than error, even when the court had general jurisdiction. The case might be one in which there was no authority to appoint a receiver. But we do not think that this is such a case. The authority to appoint a receiver in such a case is clearly given in both

the first and sixth subdivisions of section 564 of the Code of Civil Procedure. See also *Ex parte Cohen*, 5 Cal. 496; *People v. Norton*, 1 Paige, 17; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438; *West v. Swan*, 3 Edw. Ch. 420; *Von Roun v. Superior Court*, 58 Cal. 358; *Southern Pacific R. R. Co. v. Superior Court*, 55 Cal. 453. Such an appointment in no way affects the title of any party to the property involved, but simply preserves the property and keeps it within the jurisdiction until the rights of the parties can be determined.

Satisfied, as we are, that the superior court, defendant here, has jurisdiction to proceed in the case before it, and here brought under review, and that thus far it has not acted in excess of its jurisdiction, the writ must be dismissed.

So ordered.

JURISDICTION OVER NON-RESIDENTS AND THEIR PROPERTY: See *Molyneux v. Seymour*, 30 Ga. 440; 76 Am. Dec. 662, and particularly note 665-673; note to *Flint River S. S. Co. v. Foster*, 48 Am. Dec. 273, 274. Jurisdiction in equity may be upheld whenever the parties or the subject-matter are so within the jurisdiction that an effectual decree can be made and enforced, so as to do justice between the parties: *Ward v. Arredondo*, 1 Hopk. Ch. 213; 14 Am. Dec. 543; *Carroll v. Lee*, 3 Gill & J. 504; 22 Am. Dec. 350; *Mitchell v. Bunch*, 2 Paige, 606; 22 Am. Dec. 669, and note; *March v. Eastern R. R. Co.*, 40 N. H. 548; 77 Am. Dec. 732. Compare *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34, and note. By appearance in an action a party may submit himself to the jurisdiction of the court: *Johnston v. San Francisco Sav. Union*, 75 Cal. 134; 7 Am. St. Rep. 129; *Union P. R'y Co. v. De Busk*, 12 Col. 294; 13 Am. St. Rep. 221, and note. Having jurisdiction over the person of a defendant, a court may bind him by its decrees, although such decrees affect property outside of the court's jurisdiction: *McGee v. Sweeney*, 84 Cal. 100; *Poindexter v. Burwell*, 82 Va. 507. A non-resident can be sued in Texas without bringing before the court such of his effects as are within the state: *Rice v. Peteet*, 66 Tex. 568.

RESCISSION OF CONTRACTS FOR THE SALE OF REALTY. — As to when the purchaser has the right to rescind and be reimbursed, see note to *Richardson v. McKinson*, 12 Am. Dec. 312-314; *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178, and note; *Miles v. Stevens*, 3 Pa. St. 21; 45 Am. Dec. 621; *Brown v. Manning*, 3 Minn. 35; 74 Am. Dec. 736. Where a purchaser has been induced to purchase property by means of fraud practiced by the vendor, if he acts promptly after the discovery of such fraud, he has a perfect right to rescind: *Baker v. Lever*, 67 N. Y. 304; 23 Am. Rep. 117. In *Stroff v. Swafford*, 79 Iowa, 135, where defendants were shown to have induced plaintiffs to make an exchange of lands, by false representations as to quality, location, and value, the court properly decreed a rescission of the contract of exchange.

[IN BANK.]

BURKS v. DAVIES.

[85 CALIFORNIA, 110.]

VENDOR AND VENDEE — RESCISSION OF OPTION TO PURCHASE. — The vendor of an option to purchase land is bound at all times within the period of the option to convey a good title to the land mentioned therein, upon payment of the purchase price; and if the purchaser, within the time named in the option, ascertains that the vendor has no title and cannot make a perfect conveyance of the land named, he may at once rescind the option and recover what he has already paid thereunder, without first tendering payment and demanding a conveyance.

VENDOR AND VENDEE — RESCISSION OF OPTION TO PURCHASE FOR DEFECT IN TITLE. — A purchaser under an option for the sale of real estate, which is given for a sum to be forfeited in case the purchase is not consummated by a certain day, may, upon ascertaining that the vendor is not the owner of the whole title, rescind the contract within the time mentioned in the option, and recover the amount paid, although the vendor, after notice of the rescission, offers to perfect the title, but fails to do so within the time mentioned in the option.

Haynes and Mitchell, for the appellant.

Smith, Winder, and Smith, for the respondent.

PATERSON, J. On August 8, 1887, the defendant executed and delivered to the plaintiff a contract, the material portions of which, so far as this case is concerned, are as follows: "Received of J. H. Burks one thousand dollars, in purchase of option to buy the undivided one third of [certain lands particularly described]; said option to be from this date to the first day of September next. . . . In case said purchase is made during the time above mentioned, the amount this day received is to be deducted from first payment; but in case the said purchase is not made in said time, then the amount this day received shall be forfeited, and no part of said option money is to be returned. Time is the essence of this contract." The court found that at the time of the transaction the plaintiff understood that the defendant was the owner of an undivided one third of the lands referred to in the agreement, and that the remaining two thirds were owned by others, and being desirous of purchasing the whole of the lands, had concluded an agreement with the other parties respecting their interest, substantially the same as the one above referred to, of all of which defendant had actual notice; but, as a matter of fact, the defendant and the other parties referred to were not the owners of the entire tract of land. Five acres thereof were owned by George H. Smith. The

court found that the defendant had notice at the time of the execution of the contract that Smith was the owner of the five acres, but neglected to communicate the fact to plaintiff, although he knew plaintiff was relying on his ability to purchase the whole of the land, and would not have entered into the contract had he known of the defect in the title. Prior to the first day of September, plaintiff was notified by Smith of the latter's claim to the land, and having satisfied himself that Smith's claim was well founded, he promptly rescinded the contract, and demanded repayment of the one thousand dollars paid by him to the defendant.

The plaintiff had judgment in the court below for one thousand dollars and costs of suit, and defendant appealed.

It is said by Sugden, in his treatise on vendors, that "where a person sells an interest, and it appears that the interest which he pretends to sell was not the true one, . . . the purchaser may consider the contract at an end, and bring action for money had and received, to recover any sum of money which he may have paid in part performance of the agreement for sale." It is admitted by counsel for appellant that it is the duty of one who has made an unconditional agreement to sell land to perfect his title at once, if he desires to hold the vendee to his bargain, but they claim "no such imperative duty rests upon one who has merely sold an option. His obligation to convey does not arise until the other party has notified him that he intends to purchase; . . . a party need not own property, in order to sell an option to purchase it; . . . the plaintiff never could recover the one thousand dollars unless he alleged and proved either that the defendant failed to convey after demand and tender of the purchase-money, or else some facts which excused such demand and tender on his part."

In *Goetz v. Walters*, 34 Minn. 241, the plaintiff had paid the defendant three hundred dollars as earnest money and a portion of the purchase price, under a contract for the sale to him of a certain piece of property. It was agreed between the parties that if the title to the premises was good, and the property should not be taken on the terms named in the contract, the three hundred dollars should be forfeited. The court said it made no difference whether the words "and it is agreed that if the title to said premises is not good" referred to the date of the contract or to the time for the execution of the conveyance. The court further said: "Assume that the words

refer to the time for executing the conveyance, clearly that was to be executed whenever, within the time specified, to wit, thirty days, the plaintiff should pay the five hundred dollars and deliver the horse and buggy. Within that time it was for the plaintiff, and not the defendant, to determine when performance should be required. She could have called for a conveyance within an hour after the contract was executed, her right to do so being subject only to the condition that she make the payments. Upon such a call he would have been entitled to no more time than was reasonably necessary for the execution of the papers. He was bound to be prepared at all times within the thirty days to convey a good title, and whenever within that time she should ascertain that he had no title, so that it was impossible for him to make a conveyance, she could at once avoid the contract without going to the useless trouble of tendering payment and calling on him to convey. The answer admits that she did so on May 15th. Thereupon it was the duty of defendant to repay to her the three hundred dollars."

It has been held in England that "where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor is it in his power by the ordinary course of law or equity to make himself so, though the owner offer to make the seller a title, yet equity will not force the buyer to take; for any seller ought to be a *bona fide* contractor, and it would lead to infinite mischief if an owner were permitted to speculate upon the sale of another's estate": *Lendring v. Lunnon*, 2 Eq. Cas. Abr. 680. It is a general rule in cases of failure of title, even where the vendor is not at fault, that the purchaser may rescind the contract and recover any money paid by him as part of the purchase price: *Sanders v. Lansing*, 70 Cal. 429; *Marshall v. Caldwell*, 41 Cal. 614. In this case the vendor knew of the defect to his title at the time the contract was made, and made no attempt whatever to secure the title of Smith until after plaintiff had given him notice of rescission.

Under a contract for the sale of real estate, the vendee is regarded as the equitable owner, and the vendor a trustee of the legal title for him. If the vendor has no title to the property, the vendee is entitled to a rescission. Of course, there are cases in which the vendor is permitted to perfect his title, although he is unable, strictly, to comply with the terms of his contract. If, though he be not the absolute owner, it is in

his power, by the ordinary course of law or equity, to make himself such owner, he will be permitted within a reasonable time to do so: *Pipkin v. James*, 1 Humph. 325; 34 Am. Dec. 652.

The defendant received plaintiff's notice of rescission on September 1st, and immediately informed him that he would procure Smith's title if he, the plaintiff, desired to purchase under his option, and thereupon the plaintiff said he would give him twenty-four hours to procure the title. Defendant, through O'Dea and Stillson, procured from Smith the following written offer:—

“LOS ANGELES, Sept. 2, 1887.

“The Allen tract in lots 1 and 8, block 32, Hancock survey, containing a fraction less than five acres. . . . \$1,500 per acre, half cash, balance interest at 9 per cent on contract, 12 per cent on deed and mortgage. Will sell on above terms unless option heretofore given is taken.

“GEORGE H. SMITH.”

On the following day, September 2d, plaintiff again called on defendant, and defendant notified him that if he desired to purchase under his option he could have the whole of the land, and showed him the above offer, to which the plaintiff replied: “That only shows that you have not got the title.” Defendant told plaintiff that if he elected to purchase he would give him a bond, with satisfactory sureties, that he should have a good title to the whole of the property. At the request of the plaintiff, defendant produced a later communication from Smith to Stillson, dated also September 2d, in the following words:—

“LOS ANGELES, September 2, 1887.

“C. A. STILLSON, Esq.

“*Dear Sir*, — With regard to my written proposition to sell the Allen tract, I wish to say that if you have a purchaser ready to close at once, I will sell upon the terms proposed; otherwise please consider the proposition withdrawn.

“Yours truly,

GEORGE H. SMITH.”

It thus appears that no attempt was made by the defendant to get title to the five acres until the expiration of the option, and after the plaintiff had rescinded the contract, and, as a matter of fact, the defendant never did succeed in getting title to the property held by Smith, and could not have conveyed it before the expiration of the time given for the exercise of the option. The offer given by Smith to O'Dea and Stillson seems

to have been one subject to an option which had already been given to another party, and it was withdrawn on the day it was made.

Under the rule laid down in *Goetz v. Waters*, 34 Minn. 241,— of the soundness of which we have no doubt,— the plaintiff, we think, is entitled to recover the one thousand dollars. This case is not in any material respect different from the case referred to. It involves the same principles, and it was not necessary for the court to find whether the plaintiff was willing or anxious to take the property.

Judgment and order affirmed.

CONTRACTS FOR SALE OF LAND— DEFECTIVE TITLE. — A purchaser cannot be compelled to take a defective title: *Hale v. Cravener*, 128 Ill. 408; *Moore v. Williams*, 115 N. Y. 586; *Wetmore v. Bruce*, 118 N. Y. 319; *Kursheedt v. U. D. S. Institution*, 118 N. Y. 358; *West v. Shaw*, 32 W. Va. 195; unless he is shown to have stipulated to accept such a title: *Hedderly v. Johnson*, 42 Minn. 443; 18 Am. St. Rep. 521; *Vought v. Williams*, 120 N. Y. 253; 17 Am. St. Rep. 634. But a defect in the title may be removed within the time fixed for the completion of the purchase: *Gregory v. Christian*, 42 Minn. 304; 18 Am. St. Rep. 507, and note. A purchaser entitled to rescind a contract for the sale of land may recover the money he has parted with under the contract: *Ferguson v. Teel*, 82 Va. 690; and it is not necessary for him to rescind before bringing suit for the recovery of such money: *Stockham v. Cheney*, 62 Mich. 10; *Wright v. Dickinson*, 67 Mich. 580; 11 Am. St. Rep. 602, and note. The purchaser may also recover back money spent in examining the title and in preparing the necessary papers, with interest on the money he is entitled to recover from the date of demand and refusal to pay the same: *Turner v. Reynolds*, 81 Cal. 214.

[IN BANK.]

ALTA LAND AND WATER COMPANY v. HANCOCK.

[85 CALIFORNIA, 219.]

RIPARIAN RIGHTS, NATURE AND EXTINGUISHMENT OF. — Riparian rights are an appurtenance to the land, running with it as a corporeal hereditament. They may be segregated by grant or condemnation, or extinguished by prescription, but cannot be defeated by simple appropriation.

RIPARIAN RIGHTS — EXTINGUISHMENT. — As to riparian rights, actual and uninterrupted user, if adverse, for a useful purpose, and under claim of right, continued for the statutory period, gives a prescriptive right, and extinguishes the rights of the riparian proprietor.

RIPARIAN RIGHTS — PRESCRIPTION. — APPROPRIATION is not necessary to prescription in relation to acquiring riparian rights, but it affords one who seeks to acquire rights by prescription this advantage, that it gives to prior claimants notice that his user is adverse and under claim of right, and sets the statute in motion against such prior claimants.

RIPARIAN RIGHTS — PRESCRIPTION. — THE ADVERSE ENJOYMENT necessary to a prescriptive right to divert and use the water of a stream must have been asserted under claim of title, with the knowledge and acquiescence of the party having the prior right, and must have been such an invasion of his right that he would have had ground of action against the intruder, and must be accompanied by all the elements necessary to make out an adverse possession, and be continuous and uninterrupted for five years.

RIPARIAN RIGHTS OF OWNER OF LAND IN WATER, or the use thereof, flowing upon such land, is not lost by user upon such land by another, under no claim of right to divert it or use it elsewhere, no matter how adverse or long continued, and it makes no difference that during part of this time the land was held adversely to the owner, if such holding was interrupted before it ripened into a title by prescription.

RIPARIAN RIGHTS — INTERRUPTION OF PRESCRIPTIVE RIGHT TO WATER. — An interruption by suit in ejectment, so as to prevent the acquiring of a prescriptive right to land, also interrupts the use of water appurtenant thereto being used thereon, so as to prevent the acquiring of a prescriptive right to the use of the water there or elsewhere, and a recovery of the land carries with it the recovery of the water.

RIPARIAN RIGHTS. — USE OF WATER UPON LAND to which it is already appurtenant, by a trespasser thereon, will not give him such right in the water as that he may thereafter divert it from the land, or upon being lawfully ejected therefrom, convey to a stranger a legal title in the water or in the use thereof.

RIPARIAN RIGHTS — IRRIGATION. — The right of the riparian proprietor to the use of water for irrigation is among the last of his riparian rights, and cannot be extended even by implication. It must always be held in subordination to the rights of all other riparian owners to the use of the water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract held as an entirety, bordering upon the stream, whatever its extent. After this, the right of the riparian owner to a reasonable use of the water for the purposes of irrigation is acknowledged in common with others in like situation.

RIPARIAN RIGHTS EXTEND TO ALL LAND held as an entirety bordering upon a stream, whatever its extent, and the area of land to which riparian rights are appurtenant cannot be diminished by the acts of a trespasser segregating for the time being the actual occupancy, without segregation of the title of a portion of the land held as an entirety not bordering on the stream, nor can the use of all the waters of the stream for the irrigation of that portion of the tract change the law, and establish that only that portion is riparian to the stream.

Byron Waters, Wicks and Ward, Edwin A. Meserve, and Charles J. Perkins, for the appellant.

Barclay, Wilson, and Carpenter, and E. E. Rowell, for the respondents.

Fox, J. This is an action to quiet title to the claim of plaintiff, a corporation, to the right to use seven eighths of the waters of East Twin Creek, in San Bernardino County.

Judgment went for the defendants, from which plaintiff appeals, the case coming up on the judgment roll.

Plaintiff claims by prescription in favor of its grantors, and under grant of such alleged prescriptive right to itself. Defendants are riparian proprietors on both sides of the stream, below the point where plaintiff claims the right of diversion. It was alleged and shown that in April, 1875, the defendant Hancock, who was then the owner of a tract of 1,280 acres, part of the Muscupiabe rancho, lying on both sides of this creek, and below the point at which plaintiff claims the right to divert seven eighths of its waters (and under whom the other defendants now claim as grantees), took the preliminary steps to acquire by appropriation five hundred inches of this water; but this right of appropriation was never perfected, and its consideration is of no moment in this case, as it is conceded by both parties that defendants take nothing by that proceeding.

Nor is it necessary in this case to discuss the character or extent of the right of Hancock or his grantees to the use of the waters of the creek by virtue of his riparian proprietorship. That they had some right in the flow, and to the use of said waters, as such riparian proprietors, is conceded on both sides. To the extent that it existed, it was an appurtenance to the land, running with it as a corporeal hereditament. It was one which might be segregated by grant or by condemnation, or extinguished by prescription, but could not be defeated by simple appropriation. The term "appropriation," as applied to the acquirement of the right to the use of water, has in this state a statutory technical meaning, and the simple act of appropriation under the statute will not of itself defeat or extinguish any prior right. Actual and uninterrupted user, however, with or without the statutory appropriation, if adverse, for a useful purpose, and under claim of right, continued for the period prescribed by the statute of limitations, gives a prescriptive right which will extinguish the rights of the riparian proprietor. Statutory appropriation, therefore, is not necessary to prescription, but it gives to one who seeks to acquire right by prescription this advantage, that it gives to prior claimants notice that his user is adverse and under claim of right, and sets the statute in motion against such prior claimant.

In this case the claim of plaintiff is based upon prescription, pure and simple. If it is valid, it has, to the extent of

seven eighths of the waters of that creek, extinguished the rights of defendants. If, under the facts, however, plaintiff's claim has not merged into title by prescription, then plaintiff has no right which can be quieted in this action, and it is not in position to question the right or the extent of the right of defendants.

The court finds that in April, 1875, the defendant Hancock was the sole owner of the 1,280-acre tract of land hereinabove mentioned; that in May, 1887, he conveyed the same, with the water rights appurtenant thereto, to the other defendants herein, reserving to himself seventeen acres thereof, with a certain quantity of the water for the use of said seventeen acres, and that at the time of the filing of the complaint herein, the defendants were the owners in fee of the whole of said tract; that in the spring of 1876, one Burton entered upon eighty acres of land, part of said 1,280-acre tract, situate from a half to three quarters of a mile from the channel of the creek, claiming the same as a squatter, and believing the same to be government land; and at the time of such entry diverted from the channel of said creek, at a point beyond and outside of the rancho, all the waters of said creek, and conducted the same through an artificial channel made by him to the said eighty-acre tract so entered upon by him, and there used all of said water for the irrigation of said eighty-acre tract, until some time in 1877, when one Stones in like manner entered upon a forty-acre tract, part of said 1,280-acre tract, adjoining that so entered upon by Burton, and thereafter, by some arrangement between Burton and Stones, the latter commenced to use one fourth of the water so diverted by Burton, for the irrigation of his forty-acre tract; that Stones also entered as a squatter, and he and Burton both claimed adversely to Hancock; that they so continued to use all the said water, for said purpose, and upon the said lands, and not elsewhere, until August, 1887; that the said use was continuous, open, notorious, peaceable, and adverse to all the world; that while so using and claiming the said water, they also used and claimed the land upon which the same was used, by the same character of holding and title, namely, adverse to Hancock, but never set up any special or distinctive right in the water different from their right in the land, but claimed both land and water; that in July, 1881, Hancock, being then the owner of the whole of the said 1,280 acres, commenced an action in ejectment against Burton, Stones, and others for the recovery

of the possession thereof, which culminated in a judgment in favor of Hancock, in August, 1885, appealed to this court, where the judgment was affirmed, and the *remittitur* therein filed in the court below August 4, 1887, when a writ of possession was issued under which Burton and Stones were put out, and possession restored to Hancock; that five years did not intervene between the time when the water was so diverted by Burton, and the time when such action was commenced by Hancock; that it is not shown that said Burton or Stones ever paid any taxes on said water right, or on the right to divert the same, or that any were ever levied thereon, but it is shown that Hancock has paid taxes, and taxes have been levied, upon the whole of said 1,280 acres of land every year since and including the said year 1876.

The court then finds that during the year 1887, and prior to the execution of the writ of possession, all the right which Burton and Stones, or either of them, acquired in and to the said waters, or to use and divert the same, came down by certain mesne conveyances to and became vested in this plaintiff, who acquired and took the same with full notice of the pendency of said ejectment suit, and that plaintiff still holds the same.

And as conclusion of law the court finds that the plaintiff, at the time of the commencement of this action, had no estate, right, title, or interest in or to the waters of said creek, or any of the tributaries thereof, and thereupon ordered judgment for defendants, which was entered accordingly.

It will thus be seen that the whole question is, whether these facts gave to plaintiff's grantors a prescriptive right to the diversion and use of that water.

This right becomes fixed only after five years' adverse enjoyment: *Crandall v. Woods*, 8 Cal. 136; *Union Water Co. v. Crary*, 25 Cal. 504; 85 Am. Dec. 145. And to have been adverse, it must have been asserted under claim of title, with the knowledge and acquiescence of the person having the prior right, and must have been uninterrupted: *American Co. v. Bradford*, 27 Cal. 360. In order to constitute a right by prescription, there must have been such an invasion of the rights of the party against whom it is claimed that he would have had ground of action against the intruder: *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185. To be adverse, it must be accompanied by all the elements required to make out an adverse possession; the possession must be by

actual occupation, open, notorious, and not clandestine; it must be hostile to the other's title; it must be held under claim of title, exclusive of any other right, as one's own; it must be continuous and uninterrupted for the period of five years: *Thomas v. England*, 71 Cal. 458.

Can it be said that the use made of this water was adverse to Hancock's riparian right, when it was used upon his own land riparian to the stream, and under no pretense or claim of right to divert or use it elsewhere? We think not. The use of the land may have been adverse and against his will, but the bringing of the water to and use of it upon his land was an improvement of his land, and an advantage to him; not an act which, of itself, gave him an independent cause of action for its diversion, and required him to bring such action or lose his right in the water. If, while as trespassers occupying a portion of his land, Burton and Stones had undertaken to divert the waters of the stream, and carry them away from the land, this would have been an act so hostile to his right as to have given him an independent cause of action for the diversion. If, after notice of such an act, he had suffered them to divert the water away from his land for the period of five years, without interruption, they might have acquired a right in the water which would have extinguished his own. But as his right in the water, or the use thereof, was a corporeal hereditament appurtenant to his land, we cannot conceive that such right would be lost by user upon his land, under no claim of right to divert or use it elsewhere.

Nor was the use "uninterrupted" for the period of five years. The court has apparently, *ex industria*, refrained from the use of that word in the findings. And yet the use must be not only adverse, under claim of right, open and notorious, but it must be "uninterrupted" for the period of five years, to ripen into a right by prescription. The court has found that the use was "continuously" from 1876 to 1887, but not that it was "uninterruptedly." Counsel insists that the words are synonymous, — that the one means the same as the other. They are very nearly, but not in law exactly, synonymous. This case furnishes a fair illustration of the distinction between them. Burton and Stones used this appurtenant to the land "continuously" for the period of eleven years. They used the land itself, and this appurtenant to it on the land, during the whole of the same period, "continuously." The use of the land was unquestionably adverse to the claim

and right of Hancock, and yet its continuous use for the period of eleven years did not give to those using it a right to the land by prescription, — though the rule of law as to acquiring right to land and right to water, by prescription, is the same. Then why did it not give the right? Because, just before the expiration of the five years, the use was "interrupted" by the bringing of the action in ejectment, and this interruption, though it did not break the continuity of use until final judgment and writ of possession, six years afterward, stopped the running of the statute, and no right could be acquired by use after that during the pendency of that suit. As this in law so interrupted the use of that land as to prevent the acquiring of a prescriptive right to the land itself, so it also, and by the same act, so interrupted the use of every appurtenant to the land which was being used on it, as to prevent the acquiring a prescriptive right to that appurtenant, to use it there or elsewhere. The recovery of the land in ejectment carried with it the recovery of every appurtenant thereto. Burton and Stones, according to the findings, had never attempted to acquire or asserted any right in the water independent of or segregated from the land, or under other right, title, or claim than that which they asserted to the land. They therefore, when ejected, had nothing to convey to plaintiff, and the plaintiff acquired nothing under them.

We fully concede the proposition contended for by appellant, based upon *Smith v. Logan*, 18 Nev. 149, that the use of water by a trespasser upon the land of another does not make such water appurtenant to the land upon which it is wrongfully used. But it does not follow from this that the use of water upon land to which it is already appurtenant, by one who is a trespasser thereon, will give him such a right in the water as that he may thereafter divert it from the land, or upon being ejected therefrom, convey to a stranger a legal title in the water or in the use thereof. We do not mean to be understood as holding, and indeed it is not claimed, that anything has been added to the rights of defendants by the acts of Burton and Stones; but simply that nothing has been taken from those rights. It is probable that there are those as against whom these defendants could not successfully claim the right to the use of all the water which Burton and Stones carried upon their lands; but the measure of their rights is not here involved. The judgment in this case does not determine them. It simply determines that the plaintiff has no

right which it is entitled to have quieted as against the defendants.

Beyond the proposition above stated, the case of *Smith v. Logan*, 18 Nev. 149, is not in point.

Nor is there anything which militates against the view here taken in the further proposition insisted upon by appellant, that the 120 acres upon which Burton and Stones used this water were not riparian to the stream. Situate, as this tract was, a half-mile or more away from the stream, if it had been held by a title separate from and independent of the 1,280-acre tract, it would not have been riparian, and no portion of the waters of the stream would have been appurtenant to it. But the 120 acres was a part of and never segregated from the 1,280 acres, all of which was riparian to the stream. We do not understand *Lux v. Haggin*, 69 Cal. 255, as holding, as claimed by appellant, that only that portion of a larger tract bordering upon a stream is riparian thereto which is actually washed by the waters of the stream, or only so much thereof as the waters of the stream are sufficient to irrigate. Such a rule, while it would limit the area of riparian lands to a comparatively infinitesimal quantity, would extend the rights of a riparian proprietor to whom the water might first come far beyond anything heretofore recognized or claimed for them. It would recognize the right of such proprietor to consume, if he could, on his riparian lands, all the waters of the stream, for purposes of irrigation, without regard to the rights of other proprietors below him, either for their natural wants or for irrigation. So far, the right of a riparian proprietor to the use of water for purposes of irrigation at all has been assumed, rather than determined, and has been properly regarded as among the last, though perhaps not the least important, of his riparian rights; one that must be always held in subordination to the rights of all other riparian proprietors to the use of water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract held as an entirety, bordering upon the stream, whatever its extent. These natural wants supplied and protected, the right to a reasonable use of the surplus water by the riparian proprietor, in common with others in like situation, for purposes of irrigation, has been acknowledged and recognized, but it cannot be extended even by implication. Nor can the area of the lands to which riparian rights are appurtenant be diminished by the acts of a trespasser segregating, for the time being, the actual occu-

pancy, without segregation of title. Nor can the use of all the waters of a stream upon 120 acres of land change the law, and establish it as a fact that there can be but 120 acres riparian to that stream, as claimed by appellant.

We do not deem it necessary to follow the counsel for appellant in their discussion of the question of the payment of taxes as one having any effect upon this case, nor do we find anything in any of the authorities cited in conflict with the views here expressed.

Judgment affirmed.

RIPARIAN RIGHTS, THE NATURE OF. — The right to running water, in California, is a right running with the land; a corporeal privilege bestowed upon the occupier of the soil: *Hill v. Newman*, 5 Cal. 445; 63 Am. Dec. 140. But water rights may be extinguished by the appropriation and adverse use thereof by some other person, continued sufficiently long to create a right in the adverse holder: *Buddington v. Bradley*, 10 Conn. 213; 26 Am. Dec. 386; *Davis v. Fuller*, 12 Vt. 178; 36 Am. Dec. 334, and note; *Alhambra v. Richardson*, 72 Cal. 598. In California the statutory period is five years: *Coonrad v. Hill*, 79 Cal. 587. The adverse use for five years must, however, be under a claim of right adverse to the rights of the real owner: *Paige v. Rocky Ford etc. Co.*, 83 Cal. 85. There can be no adverse possession of water rights from which title by prescription may be acquired, unless the acts constituting the adverse use are of such a nature as to raise a cause of action in favor of him against whom the acts were performed, and to create the presumption of a grant of an easement as the only hypothesis on which to base his failure to complain thereof: *Lakeside Ditch Co. v. Crane*, 80 Cal. 181. A finding does not show a prescriptive right to water unless it shows that the use thereof was adverse: *Oneto v. Restano*, 78 Cal. 374. In *Coonrad v. Hill*, 79 Cal. 587, it is decided that so far as the defense to an action for a diversion of waters is based upon a prescriptive right or an equitable estoppel, it is immaterial whether defendant made an appropriation according to law or not.

RIPARIAN RIGHTS — IRRIGATION. — As to the right of the riparian proprietor to use water for the purposes of irrigation, see note to *Davis v. Getchell*, 79 Am. Dec. 643, 644. All the riparian owners are equally entitled to a reasonable use of the waters flowing along or through their lands: *Heilbron v. Water Co.*, 80 Cal. 189; note to *Heath v. Williams*, 43 Am. Dec. 275–279. For the doctrine peculiar to the Pacific states, see note to *Heath v. Williams*, 43 Am. Dec. 279, 280; *Reno Smelting Works v. Stevenson*, 20 Nev. 269; 19 Am. St. Rep. 364, and note. As between those using the water of natural streams for the same beneficial purpose, priority gives the superiority of right, regardless of the mode of diversion: *Farmers' etc. Co. v. Southworth*, 13 Col. 112. And after waters have been diverted and applied to a beneficial use, the appropriator has a perfect right to the water against everybody except the owner or those who claim adversely: *Necochea v. Curtis*, 80 Cal. 397. One who has acquired a right to divert water from a stream may change the point of diversion and place of use without losing his right of priority, if the rights of others are not thereby impaired: *Fuller v. Mining Co.*, 12 Col. 12.

DIVERSION OF WATERS, ACTIONS FOR. — Several persons, through whose lands a watercourse runs, may join as plaintiffs to restrain the diversion of

the waters by one above them: *Churchill v. Lauer*, 84 Cal. 233. The plaintiff must prove a right to use the water of which he claims to be deprived, as well as show some actual injury resulting from an interference with such right: *Franklin v. Pollard Mill Co.*, 88 Ala. 318; *Sharp v. Hoffman*, 79 Cal. 404. But in an action to quiet title to water rights, it is not necessary that there should be an actual interference with the plaintiff's rights; the assertion of an adverse claim is all that is necessary: *Peregoy v. Sellick*, 79 Cal. 569.

[IN BANK.]

EX PARTE KUBACK.

[85 CALIFORNIA, 274.]

MUNICIPAL CORPORATIONS — CONSTITUTIONALITY OF ORDINANCE AGAINST EMPLOYING CHINESE. — A city ordinance making it a misdemeanor for any contractor employed under contract with the city to employ any person to work more than eight hours a day, or to employ Chinese labor under such contract, is an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, a direct infringement of the right of such persons to make and enforce their contracts, and unconstitutional and void so far as it attempts to create a crime.

CONSTITUTIONAL LAW — PERSONAL RIGHTS. — Any person may pursue any lawful calling in his own way, not encroaching upon the rights of others. It is not competent to forbid any person or class of persons, whether citizens or resident aliens, offering their services in a lawful business, or to subject others to penalties for employing them, unless the nature of the work is such as makes it unfit for certain persons, as for females and infants.

George M. Holton, for the petitioner.

C. McFarland, and *Albert Crutcher*, for the respondent.

The COURT. This is an application for a writ of *habeas corpus*. The petitioner was tried and convicted of a misdemeanor under the following ordinance of the city of Los Angeles: —

“The mayor and the council of the city of Los Angeles do ordain as follows:—

“Sec. 1. Eight hours' labor constitutes a legal day's work in all cases where the same is performed under the authority of any ordinance, resolution, or contract of the city, or under the direction, control, or by the authority of any officer of the city, acting in his official capacity; and a stipulation to that effect must be made a part of all contracts to which the city as a municipal corporation is a party.

“Sec. 2. It shall be unlawful for any contractor, by him-

self or through another, when having labor performed under any contract with the city, to demand, receive, or contract for more than eight hours' labor in one day from any person in his employ or under his control, with the promise or understanding that such person so laboring over eight hours shall receive a sum for said day's work more than that paid for a legal day's work.

"Sec. 3. It shall be unlawful for any contractor, by himself or through another, when having labor performed under any contract with the city, to employ Chinese labor thereon.

"Sec. 4. Any person or persons violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than ten dollars nor more than fifty dollars for every such offense."

It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, as, for example, females or infants, the ordinance might be upheld as a sanitary or police regulation, but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day. Mr. Cooley, in his work on constitutional limitations, says:—

"The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class by leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recog-

nizing the impropriety and forbidding women engaging in them would be open to no reasonable objection. The same is true of young children, whose employment in mines and manufactories is commonly, and ought always to be, regulated. And some employments, in which integrity is of vital importance, it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable."

For these reasons, we hold the ordinance, so far as it attempts to create a criminal offense, to be void, and that the petitioner should be discharged.

It is so ordered.

MUNICIPAL CORPORATIONS — ORDINANCES. — Municipal ordinances must be consistent with the constitution and general laws of the land: Note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 628.

LAWS IMPAIRING THE OBLIGATION OF A CONTRACT are unconstitutional: *Trustees v. Bailey*, 10 Fla. 112; 81 Am. Dec. 194, and note. For the rules applicable to statutes conflicting with vested rights, see note to *Goshen v. Stonington*, 10 Am. Dec. 134-136; compare *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465.

[IN BANK.]

METZ v. CALIFORNIA SOUTHERN R. R. Co.

[85 CALIFORNIA, 329.]

COMMON CARRIERS. — IMPLIED CONTRACT TO CARRY LUGGAGE of a passenger includes only such a quantity of articles as are ordinarily taken by a passenger for his personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey.

COMMON CARRIERS — JEWELRY AS BAGGAGE. — A gentleman passenger traveling without his wife or other female companion is not, ordinarily, no matter what his station in life, entitled to carry as baggage, for his personal use or convenience, a quantity of lady's jewelry; and if he does carry it, and it is lost, he cannot recover therefor from a carrier who has no knowledge of its being among the contents of a trunk carried as luggage.

A. Brunson, C. W. C. Rowell, and Charles R. Redick, for the appellant.

A. W. Blair, for the respondent.

SHARPSTEIN, J. This appeal is from a judgment rendered in favor of plaintiff, and against defendant, for the sum of \$357, and costs.

The only question presented by the record is, Do the findings support the judgment?

The court finds that at Kansas City, Missouri, in January, 1888, the plaintiff engaged passage on the defendant's railroad to Colton, in this state, bought a ticket, paid his fare, and checked his trunk, containing, among other things, one lady's gold watch and chain, of the value of one hundred and fifty dollars; one lady's breastpin and ear-rings, of the value of fifteen dollars; five lady's gold rings, of the value of twenty-five dollars; one set lady's small gold ear-rings, of the value of five dollars; two lady's silver rings, of the value of two dollars; one lady's gold bracelet, of the value of twenty-five dollars,—which the court found to be "proper articles of luggage and baggage for the plaintiff to carry as such."

Defendant had no knowledge of said contents when it received and checked said trunk, and assumed no other obligation in relation thereto than such as was imposed by law under the facts above stated; that is, there was no special contract between the parties relating to said trunk and contents.

When the trunk was delivered to plaintiff by defendant, at Colton, the articles above named, together with other articles, the right to recover the value of which is conceded by appellant, were missing, and were not, and never have been, delivered to plaintiff.

The court further finds that all the articles so lost were carried in said trunk, not for trade, gift, or speculation, but for transportation. The value of these articles is included in the judgment recovered by plaintiff against defendant, and appellant insists that the judgment should be modified by deducting from it the value of said above-enumerated articles. And his contention is, that said articles, or none of them, constituted what in law is defined to be luggage or baggage.

Common carriers are required to receive and carry a reasonable amount of luggage for each passenger without charge: Civ. Code, sec. 2180.

"Luggage may consist of any article intended for the use of a passenger while traveling, or for his personal equipment": Civ. Code, sec. 2181.

Before the enactment of this code, courts acknowledged the difficulty of defining with accuracy what should be deemed luggage, within the rule of the carrier's liability, and we think this provision of the code has disencumbered the subject little,

if any, of the difficulty which previously surrounded it. If we define the word "equipment" as Webster defines it, viz., "the act of equipping or being equipped for a voyage or expedition," it adds nothing to what had long before been understood as comprehended in the term "luggage."

In *Hannibal R. R. Co. v. Swift*, 12 Wall. 272, the court, speaking through Mr. Justice Field, said that the contract to carry "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, — such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a decision of the queen's bench in *Macrow v. Great Western R'y Co.*, L. R. 6 Q. B. 121, where Chief Justice Cockburn announced the true rule to be, "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage."

It is not found that the plaintiff carried those articles for his personal wear or convenience, with reference to his immediate necessities or to the ultimate purpose of his journey. But it is found that he was carrying them for transportation. And it is found that they were proper articles of luggage and baggage for the plaintiff to carry as such.

We are not prepared to hold that a gentleman traveling without a wife or other female companion would, ordinarily, no matter what his rank or station in life might be, carry as baggage for his personal use or convenience a quantity of lady's jewelry, or that if he did carry it, and it was lost, he could recover the value of it of a common carrier who had no knowledge of its being among the contents of a trunk which was being carried as luggage.

In one case, *McGill v. Rowland*, 3 Pa. St. 451, 45 Am. Dec. 654, the supreme court of Pennsylvania held that where a man was traveling with his wife, whose jewelry was in a trunk which was being transported as baggage, and was lost, the husband was entitled to recover of the common carrier its value. In that case, it might well have been held that the jewelry "was intended for the use of a passenger while traveling."

The supreme court of the United States, in *New York Cent. &*

H. R. R. Co. v. Fraloff, 100 U. S. 24, says: "Whether articles of wearing apparel, in any particular case, constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when traveling."

"The implied understanding," says Mr. Angell, "of the proprietors of stage-coaches, railroads, and steamboats, to carry in safety the baggage of passengers is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveler usually carries with him for his personal convenience": Angell on Carriers, sec. 115.

In *Pfister v. Central P. R. R. Co.*, 70 Cal. 169, 59 Am. Rep. 404, this court had occasion to consider the provisions of the code above cited, but the question in that case was, whether a passenger was entitled to carry a large sum of money as baggage. It was held that he was not. But that decision in no way aids us in the solution of the question involved in this case. We are satisfied, however, in this case, that the findings do not support the judgment for more than \$135, the value of the articles lost, other than those which we have enumerated above.

It is therefore ordered that the judgment be modified by deducting therefrom all over \$135, and the plaintiff have judgment for that sum only, and that appellant recover the costs of its appeal.

CARRIERS—BAGGAGE.—An agreement to carry a passenger's ordinary baggage is implied in the contract to carry a passenger himself; but the implication cannot be extended a single step beyond such things as a traveler usually has with him as part of his luggage: *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; see note to *Connolly v. Warren*, 8 Am. Rep. 302-304; note to *Hutchings v. Western etc. Railroad*, 71 Am. Dec. 158-163, as to what baggage a passenger is entitled. As to the legal significance of the word "luggage," see *Pfister v. Central P. R. R. Co.*, 70 Cal. 169; 59 Am. Rep. 404; *Staub v. Kendrick*, 121 Ind. 226.

HUSE v. DEN.

[85 CALIFORNIA, 390.]

TRUST DEED. — **EXECUTION AND DELIVERY** of a trust deed intended as a settlement for the benefit of the grantor's children is shown when it appears that though the grantor was nominally one of the trustees named therein, and retained possession of it, still he had it formally acknowledged and recorded, and recognized it in his subsequent will, and that the other trustee was present when it was executed, and consented to become one of the trustees therein and to act as such.

ESTATES OF DECEDENTS. — **SALE BY EXECUTOR WITHOUT ORDER OF COURT** under a will containing no power to him to so sell is void.

VOID EXECUTOR'S SALE — **ESTOPPEL IN PAIS.** — A purchaser at a void executor's sale can claim no estoppel *in pais* against the heirs from acquiescence, when the truth concerning material facts affecting the title was not unknown to him, or he did not lack the means of discovering it.

VOID EXECUTOR'S SALE — **SUBROGATION.** — Purchaser at a void executor's sale, with knowledge that the land is subject to a trust, and of the want of power of the executor to sell, is not entitled to subrogation against the heirs, especially when he has made his payments to the executor and trustees, who have used the money indiscriminately with other moneys, received from sales of personal property and other land for various purposes.

VOID EXECUTOR'S SALE — **IMPROVEMENTS.** — In an action to recover land from the purchaser at a void executor's sale, no allowance can be made for improvements except as an offset for damages claimed for withholding the possession. This under section 741, California Code of Civil Procedure.

THIS action was originally brought by C. E. Huse and J. M. Hill against R. S. Den, the ten children of N. A. Den, deceased, their mother, and W. W. Hollister and others, to whom Huse and Hill, as the executors of N. A. Den, had attempted to sell part of the land in dispute. In their complaint, Huse and Hill asked for the confirmation of their acts, the settlement of their accounts, and the sales of the residue of the trust property. Hollister and the other purchasers filed cross-complaints, asking that their title be quieted. The widow and children of N. A. Den filed cross-complaints, asking that their respective rights be determined and that the deeds made by Huse and Hill be declared void. The other facts are stated in the opinion.

Henry E. Highton and Philip G. Galpin, for the appellants.

Oliver P. Evans and T. B. Bishop, for the respondents.

MCFARLAND, J. This is an appeal by defendants, Hollister *et al.*, from an order denying a new trial. There is also another appeal by the same defendants (No. 12728) from the judg-

ment rendered in the action. The transcripts in the two appeals are substantially the same; and as the points in the two are similar, they have been argued and submitted together. The subject-matter involved is the ownership and right of possession of two tracts of land, each being part of the Rancho dos Pueblos, in the county of Santa Barbara,—one containing 2,785 acres, and the other 112 acres. The main issue as to the ownership is between the heirs of Nicholas A. Den, deceased, and Hollister *et al.*, who claim as purchasers from the executors of said Den, deceased,—these purchases having been made without any orders of the probate court. The judgment of the court below was in favor of the heirs and against the purchasers, who appeal. The case has been in this court before. It was first decided in the lower court in favor of the purchasers, but upon appeal the judgment was reversed in this court, and the cause remanded. After some amendments to the pleadings, it was tried again, with the result as above stated.

When the case was here before, the history and facts of the case were so fully stated in the opinion of the court that we do not deem it necessary to restate them here: See *Hill v. Den*, 54 Cal. 6; and many of the questions involved were decided at that time, and have become the law of the case. We will therefore notice the new features which the present appeals present.

1. An important document in the case is a deed of trust embracing one undivided half of the rancho, executed by said Nicholas A. Den and wife to himself and one R. S. Den, on September 16, 1851. This deed was attacked on the first trial as invalid and inoperative, for various reasons then presented; but this court held that deed to create a perfectly valid and operative trust for the purposes which it declared: 54 Cal. 19, 20; and such must now be held to be the law on that point. On the first trial, however, while the appellants here denied the effect of this deed as claimed by the heirs, they admitted its due execution, but before the second trial they amended their pleadings so as to deny its execution. Therefore, the point as to its execution was not before this court on the former appeal. But at the second trial the court below found that it was delivered; and we think the finding is based on sufficient evidence. There is no dispute that the instrument was signed and acknowledged by Nicholas A. Den and his wife; but it is contended that there was no sufficient delivery, because there

was no formal and physical handing of it over to the other trustee, R. S. Den. But R. S. Den was present when it was prepared, signed, and acknowledged, and consented to become one of the trustees therein and act as such. It remained afterward in the possession of Nicholas A. Den, who caused it to be recorded in the recorder's office a month or two afterward, and was among his papers at time of his death, and in his will he referred to it, and recognized it as an effectual vesting of the property mentioned in it in the grantees in trust. The intent of the grantor is the main thing to be discovered. Here the grantor was himself nominally one of the grantees; the deed was intended to be a deed of settlement for the benefit of his children, and was in the nature of a covenant to stand seised for the benefit of the *cestui que trust*; it was formally acknowledged and recorded; the other grantee was present and accepted the trust, and the grantor recognized it in his subsequent will. These circumstances were sufficient to warrant the court in finding a complete execution of the instrument.

2. Nicholas Den died on March 3, 1862, leaving a widow and ten children. He also left a will, which was duly probated, in which José Maria Hill, Charles E. Huse, and Alfred Robinson were named as executors. Robinson afterward resigned as executor, and Hill and Huse undertook, without any order of the probate court, to sell and make conveyances of land of the estate to Hollister and others,—under which conveyances appellants claimed the legal title at the first trial. But this court, on the former appeal, construed the will, and held that it gave no power to the executors to sell the real property; that such sale could have been made only under an order of the probate court; and that the sales and conveyances attempted to be made were void: 54 Cal. 21, 22. This ruling was not only clearly correct, but is the law of the case.

It is urged, nowever, that although the sales by the executors were void, still the doctrine of estoppel *in pais* may be invoked by appellants. But the facts and pleadings on that point are substantially as those on the former appeal; and this court then held that "there is no foundation here for the claim of an estoppel *in pais*. The rules which govern in such cases have been so often laid down here that they do not require repetition." This ruling, adopted by the court below, meets our approbation, and is also conclusive on the point: 54 Cal. 23.

3. The point that the heirs were barred by the statute of

limitations was also made on the former appeal, and decided adversely to appellants, — this court holding that “the statute of limitations has no application”: 54 Cal. 23.

4. The appellants make the point, which does not appear clearly to have been made at the former trial and appeal, that, upon the doctrine of subrogation, they are entitled to be reimbursed the amounts paid by them at the void sales. On this point we agree with the findings and opinion of the learned judge of the court below. When one purchases land at a void judicial sale, in entire ignorance that it is void, and in good faith pays money thereon, which is applied to the satisfaction of a lien or encumbrance upon the land, it has been held, in some cases, that he should be put in the place of the creditor, to the extent, at least, that his money has satisfied the lien. But in the case at bar, the purchasers knew of the deed of trust and the will; knew of the want of power of the executors to sell without an order of the probate court; were warned not to purchase without the order and sanction of said court, and purchased in the face of this knowledge and caution. They were not, therefore, ignorant purchasers in good faith, to whom the doctrine of subrogation would, under any circumstances, apply. Moreover, their payments were not made to the heirs, who are parties here, but to the executors and trustees, who used the money indiscriminately with other moneys, received from sales of personal property and other lands, for various purposes. As said by the court below: “Neither by allegation in the pleadings, nor in the evidence, has any successful attempt been made to segregate the various payments or applications of these heterogeneous funds.” For these reasons, we think the court was right in rejecting this claim of subrogation, and therefore it is not necessary to examine the question whether such a claim was not within the exclusive province of the probate court, and whether a court of equity, under our system, has jurisdiction to enforce payment of claims against an estate of a deceased person.

5. Appellants contend that they should have been allowed for the value of their improvements made on the land. Without entering into the discussion of the question whether any such allowance can be made to one who has not been a purchaser without knowledge and in good faith, we think it clear that, under our statute and former decisions in this state, such allowance can be made only as an offset for damages claimed for withholding possession: Code Civ. Proc., sec. 741. Such

allowance was made in the case at bar. The court found that the value of the improvement placed on the land was in excess of the value of the rents and profits, and therefore allowed respondents no judgment for rents or damages. This was all that appellants were, under any view, entitled to demand.

We have thus referred to all the main points in the case, and see no others necessary to be noticed in detail.

We find no error committed by the court below. This case has been very elaborately and ably presented in the various briefs of counsel. A great many authorities have been cited and discussed. It would be impossible for us to review those authorities in an opinion, without exceeding all reasonable bounds. We have therefore given only our conclusions.

The order denying a new trial is affirmed.

DELIVERY OF A DEED. — The fact that the grantor has possession of a deed after it has been duly recorded is not entitled to much weight as rebutting the presumption of delivery arising from the recordation, especially when the grantees are minors, and members of the grantor's family: *Colee v. Colee*, 122 Ind. 109; 17 Am. St. Rep. 345, and note 348, upon the subject of the delivery of deeds generally: *Collins v. Collins*, 45 N. J. Eq. 813.

SALES BY EXECUTORS WITHOUT AN ORDER FROM COURT. — The rule is, that an executor cannot sell or in any manner dispose of the decedent's realty without an order from the probate court, unless such authority is expressly bestowed upon him by the will: *Frost v. Atwood*, 73 Mich. 67; 16 Am. St. Rep. 560, and particularly cases cited in note; *Bagger's Estate*, 78 Iowa, 172; *Peirce v. Graham*, 85 Va. 227. And a discretionary power of sale of land, given to an executor for the benefit of the devisees, cannot be converted into a power to sell for the payment of debts: *In re McComb*, 117 N. Y. 378.

ESTOPPEL IN PARS, WHO MAY CLAIM. — A person setting up an estoppel by conduct must show that he exercised good faith and due diligence to know the truth; and if such circumstances are brought to his notice as would be certain to excite inquiry to the mind of an ordinary man, and the means of satisfying such inquiry are readily accessible, but are not used, he cannot be held to have exercised good faith and due diligence to know the truth: *Morgan v. Farrel*, 58 Conn. 413; 18 Am. St. Rep. 282; but see *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; 13 Am. St. Rep. 73, and note.

[IN BANK.]

GRANT v. EDE.

[85 CALIFORNIA, 418.]

AGENCY — SPECIFIC PERFORMANCE OF AGENT'S CONTRACT TO SELL. — A letter to an agent, saying, "As you stated you could get thirty thousand dollars for the place you occupy, . . . and if you can, we will sell at that price, . . . and allow you two and one half per cent on said price," — authorizes such agent to find a purchaser, but not to sell; and a contract by such agent to sell confers no rights on the purchaser which he can enforce against the principal.

Hall and Rodgers, for the appellant.

J. C. Bates, for the respondent.

PATERSON, J. It is alleged in the complaint herein that the defendant, being the owner of certain real estate, gave to Martin the following authorization to sell the same: —

"SAN FRANCISCO, August 3, 1867.

"MR. WHEELER MARTIN.

"As you stated you could get thirty thousand dollars for the place you occupy on Market Street, and if you can, we will sell at that price any time before the first day of September, 1887, and allow you two and one half per cent on said price, and if no sale is made, no expenses made to us.

"Yours truly,

[Signed]

"WILLIAM EDE."

Thereafter Martin executed and delivered to the plaintiff an agreement in the following words: —

"By virtue of the within and foregoing authority, I, Wheeler Martin, have, this twenty-third day of August, 1887, sold unto George Grant, of San Francisco, the land in said authority mentioned, situated in the city and county of San Francisco, state of California, and particularly described as follows, . . . for the sum of thirty thousand dollars, of which five hundred dollars was paid by check dated August 23, 1887, payable to said William Ede, and twenty-nine thousand five hundred dollars in cash to be paid with said check upon the execution by said Ede of a deed conveying said property to said Grant, purchaser, as aforesaid.

[Signed]

"WILLIAM EDE,

"By MARTIN, his Agent."

It is further alleged that on the execution of this agreement plaintiff paid to the defendant five hundred dollars as

a deposit and part payment of the purchase-money; that plaintiff has duly performed all the conditions on his part to be performed, and is ready and willing, on having a good and marketable title made to him of said premises, to pay the balance of the purchase-money; and that on the day named in the agreement he tendered to the defendant the sum of thirty thousand dollars, and requested such a conveyance, but the defendant refused to execute or deliver such conveyance. Plaintiff asks judgment against the defendant that, on payment by him to the defendant of the amount of the purchase-money, he, said defendant, be required to execute and deliver a good and sufficient deed. It is admitted by the appellant that the power of a broker is merely to find a purchaser, but he claims that this rule cannot apply here, because the purchaser had already been found. The case cited by him — *Rutenberg v. Main*, 47 Cal. 220 — is not like the case at bar. In that case the written instruments and corroborative circumstances showed the parties intended that on the receipt of the dispatch affirming the preliminary action of Meinecke, he, the agent, should be clothed with power to make the sale binding on his principal. The contention of appellant, that the authority to find a purchaser had been given before the letter was written to Martin, and that the latter had already found a purchaser, and reported the fact to the defendant, is not sustained by the record. The object of the writing, doubtless, was to fix the price which the defendant was willing to take for the land, and the compensation he was willing to allow Martin for making the sale. Without this written memorandum, signed by the party to be charged, Martin could not have recovered compensation for negotiating the sale of the property. The language of the letter is: "We will sell." It does not say that Martin is authorized to sell and convey for the price named, nor is any form of deed or time of payment or of delivery of possession specified. Martin was authorized simply to find a purchaser who would pay thirty thousand dollars, and if he should succeed in finding such purchaser, he was to receive a commission of two and one half per cent. The interpretation put upon the agreement by the court below is sustained by the following authorities: *Duffy v. Hobson*, 40 Cal. 244; 6 Am. Rep. 617; *Treat v. De Celis*, 41 Cal. 202; *Armstrong v. Lowe*, 76 Cal. 616. The demurrer, therefore, was properly sustained.

Judgment affirmed.

AGENT TO SELL REALTY, POWERS OF. — A general authority to sell real estate includes merely the power to find a purchaser therefor, and the agent cannot conclude a contract which will be binding upon his principal: Note to *Schultz v. Griffin*, 18 Am. St. Rep. 828.

[IN BANK.]

HAMMOND v. WALLACE.

[85 CALIFORNIA, 522.]

APPEAL FROM JUDGMENT WILL BE DISMISSED, when such appeal is not taken until nearly two years from the time when the judgment was rendered.

ERROR IN GRANTING NONSUIT is error of law, and if excepted to and specified as such, may be reviewed on appeal, without any specifications of particulars wherein the evidence was insufficient.

FRAUDULENT CONVEYANCES, SETTING ASIDE. — Mere inadequacy of price is not alone sufficient to warrant a court in setting aside a sale and a conveyance made in pursuance thereof.

VENDOR AND VENDEE — RESCISSION — SUFFICIENCY OF EVIDENCE. — *Prima facie* evidence of an agreement to prevent competition at a sale, of which the vendor alleges he had no knowledge at the time of the sale, is not ground for the rescission of the sale, when an unexplained delay of one year and a half has elapsed from the time of sale to the time of bringing the action to rescind.

VENDOR AND VENDEE — RESCISSION — LACHES. — An unexplained delay of one year and a half from the time of sale to the time of bringing an action to rescind on the ground of fraud is unreasonable, and fatal to the action.

VENDOR AND VENDEE — RESCISSION — TENDER OF CONSIDERATION PAID BEFORE SUIT. — An action to rescind a sale of land on the ground of fraud will not lie, unless the consideration paid is returned or tendered before suit, and an allegation that the vendor is able and willing to return it, and now offers to do so, is insufficient.

N. O. Bradley, P. D. Wigginton, and A. B. Hunt, for the appellant.

A. N. Drown, for the respondents.

The COURT. Plaintiff is the assignee in insolvency of Uhlhorn and Maples. On June 9, 1884, he caused to be sold at public auction certain lands belonging to them, and the defendant Wallace became the purchaser, and in due time received a deed of conveyance. She afterwards sold and conveyed various portions of the lands to the other defendants. On November 18, 1885, about one year and a half after the sale, this present action was brought to set aside the sale, on the alleged grounds that the property was bid in at a grossly inadequate price, and that the defendant Wallace had conspired with one Clowe, and others, to prevent competition in

bidding. It is also averred that the other defendants purchased of Wallace with full knowledge of the alleged fraud practiced at the auction. The court below granted a nonsuit and rendered judgment for defendants, and plaintiff appeals from the judgment, and from an order denying a new trial. The appeal from the judgment was not taken until nearly two years after the judgment was entered, and it is therefore dismissed.

Respondents contend that the question whether or not the granting of the motion for nonsuit was sustained by the evidence cannot be considered, because there is no specification of the particular in which the evidence was insufficient; but it seems to have been settled that an error, if any, in granting a nonsuit is an error of law, and if excepted to and specified as such, as was done in the case at bar, may be reviewed without any specification of the evidence: *Schroeder v. Schmidt*, 74 Cal. 459; *Donahue v. Gallavan*, 43 Cal. 576; *Cravens v. Dewey*, 13 Cal. 42. As to all the defendants, other than the defendant Wallace, there is no room to doubt the correctness of the nonsuit and the judgment. There is nothing to show that either of them had any reason to suppose that there had been any fraud or irregularity, if any such there was, at the auction sale, or that there was any agreement or understanding between either of them and the defendant Wallace that the land was, under any circumstances, to be reconveyed to the latter. Indeed, the evidence showed affirmatively that such was not the case. The motion for a nonsuit on the part of defendant Wallace was made on several grounds, and among others, that the complaint does not state facts sufficient to constitute a cause of action; that plaintiff was not entitled to rescind without first returning and restoring, or offering to restore, to said Wallace everything which he had received from her under contract, and without doing so, or offering to do so, before suit brought, and that there is no averment in the complaint of such offer; that it does not appear from the evidence that the plaintiff made any offer to defendants sufficient to entitle him to a rescission or to maintain this action; that plaintiff is not entitled to recover, by reason of his delay in bringing this action; that the proof does not correspond with the allegations; and that "the testimony of the plaintiff does not show, or attempt to show, the alleged fraudulent conduct of the defendant set forth in the complaint in this action, and complained of herein."

It does not appear upon which or upon how many of the stated grounds of the nonsuit the court based its decision. It is contended by the appellant that there was some testimony tending to show that there was a fraudulent agreement between defendant Wallace and M. E. Clowe with respect to their bidding at the auction sale, and that the court, on a motion for a nonsuit, had no right to overlook or disbelieve that testimony. The testimony of plaintiff, Hammond, showed that he was endeavoring to make an advantageous sale of the land. He says: "I had spoken to Mrs. Wallace, Mr. Crocker, and several other persons,—every one I thought likely to buy,—in reference to the bidding; was endeavoring to make a sale of this land. I asked for and received a written bid, because I did not want to put up the property or advertise it for sale without I thought it would bring a reasonable sum. . . . I made every effort I was able to to develop a sale of this property before I made any application to the court for leave to sell." He did receive a written bid from Mr. Clowe, who agreed to make that bid at auction if the land was put up for sale in that way. He says that "the bid I received [from Clowe] was satisfactory to me." The sale was properly advertised, and there was a "fair attendance" at the auction. The property was offered subject to certain mortgages which aggregated forty-seven thousand dollars, and subject also to a certain asserted claim of homestead on a part of the land. The bid which Clowe had made, according to his promise, at the auction was \$6,516.26. This bid, considering the mortgages, and not considering the homestead claim, was substantially over fifty-three thousand five hundred dollars. The defendant Wallace raised the bid a few dollars, and there being no other bid, she got the property at her offer. She went into possession and remained in possession about a year, when she sold various parts of the lands to the other defendants. On its face the sale seems to have been entirely fair. At the trial, some of plaintiff's witnesses, speaking three years after the sale, testified that in their opinion the price was inadequate. But the plaintiff, who had informed himself on the subject, testified that the bid was satisfactory to him at the time. And considering all the evidence on the point, and the delay in bringing the suit, and that mere inadequacy of price is not alone sufficient to warrant a court in setting aside a sale, we would not be warranted in saying that the

nonsuit was erroneous on account of the evidence concerning the said inadequacy.

There was, however, some evidence to the point that there was an agreement between the defendant Wallace and Clowe, that the latter, after his first bid, should not bid further against Wallace. There was no evidence to show an attempt to influence any other bidders. This evidence consists of the testimony of the two insolvents, Maples and Uhlhorn, and one other witness, about declarations which they say Mrs. Wallace made. Maples testified that before and immediately after the sale the defendant Wallace told him that she would have to pay Clowe a certain sum of money to keep him from bidding against her, and she had given him her note for that purpose. Uhlhorn testified that in June, 1885, Mrs. Wallace told him that she had given Clowe her note for a certain sum of money, to keep him from bidding; and, moreover, that he had told her at that time that Maples was going to make trouble "about the money given to Clowe, and was going to upset the sale" on that account. One other witness, Nelson, who was in litigation with the defendant, testified that defendant once told him that she paid Clowe money not to bid against her. So that, if there was any such agreement between Wallace and Clowe, Maples knew of it at the time of the sale, and Uhlhorn must have known of it soon after, because he testifies that he knew of it before June, 1885, at which time he says Mrs. Wallace told him. How long before that he knew it he does not say. And Maples, according to his testimony, was himself a party to the fraud. And according to the plaintiff's testimony, this action was brought at the instigation of Uhlhorn and Maples, who would be the principal gainers by a judgment for plaintiff if the lands are now as valuable as they claim them to be. And indeed, if the lands were as valuable at the time of the sale as they are now asserted to have been, there would have been no apparent necessity for proceedings in insolvency.

Now, it is contended by appellant that, on motion for a nonsuit (although this is an equity suit, in which the court had full control), the court was bound to overlook all other considerations, and to take the testimony of Maples, Uhlhorn, and Nelson, notwithstanding any inconsistencies or improbabilities there may have been in it, as furnishing some evidence that the alleged agreement was made between Wallace and Clowe; and that therefore the court erred in granting the

nonsuit. But admitting that, under extreme rules about nonsuit originating in actions at law, where there were juries whose province it was to decide the facts, there was sufficient evidence to establish, *prima facie*, the one fact of the alleged agreement about the bidding at the sale, still, that was not the only fact necessary to plaintiff's case. The motion for nonsuit was based upon several grounds, and among others, that there was delay in bringing the suit, and that it could not be maintained without restoring or tendering to defendant the money which plaintiff had received from her.

Assuming that the alleged contract of Wallace and Clowe about the latter not bidding was void, then, while it was in an executory form, a court would not have enforced it as between them, but would have left them just where it found them. But the executed contract of the sale of the land from plaintiff to Wallace was not void, although plaintiff, at the proper time, and by proper conduct, might have rescinded it and had it annulled by a court of equity, upon sufficient averments and proofs. But the first requisite of rescission is prompt action. The code says: "He must rescind promptly": Civ. Code, sec. 1691. In such a case, a party cannot wait until time shall demonstrate whether the contract sought to be rescinded turned out to be good or bad; and this is particularly true in a new country, where values change rapidly. Of course, if Uhlhorn and Maples could be considered as the only real parties in interest, there would be no basis whatever for this case. But taking plaintiff in his legal *status* as representing himself, or others besides Uhlhorn and Maples, then his complaint is fatally defective on this point. The only averment on the subject of laches is as follows: "Plaintiff avers that he had no knowledge, at the time of sale and conveyance of the property, of the collusion and fraud practiced by the defendant Emeline Wallace as aforesaid." As one year and a half elapsed between the sale and the commencement of the action, there is no averment that during that time he did not have such knowledge: *Collins v. Townsend*, 58 Cal. 614. And although this point was made on the motion, there was no offer to amend the complaint. This delay was unreasonable, and fatal to the action: *Bailey v. Fox*, 78 Cal. 396; *Burkle v. Levy*, 70 Cal. 254.

Moreover, there is neither averment nor proof that plaintiff ever made any attempt to rescind or make any tender of, or offer to return, anything of value received from defendant pre-

vious to the filing of his complaint, or any tender at all. The only averment upon the subject is, that plaintiff is "willing and able to return to the defendant all the moneys which she paid to him on the purchase of the property, and all the moneys which she has lawfully or legitimately paid out or expended on account of the purchase of said property, and now offers to do so." This is not sufficient. In *Herman v. Haffenegger*, 54 Cal. 161, a case very similar to the one at bar, the plaintiff had at least alleged "that prior to the commencement of the action he rescinded the contract, and had offered to return to the defendant what he received thereunder." But the court said: "It nowhere appears that any offer to return was made previous to action brought. . . . He could not maintain the action until he had so returned, or offered to do so. This was a condition precedent to his maintenance of the action. And as he did not comply with this requisite, the nonsuit was properly granted." See also *Gifford v. Carvill*, 29 Cal. 589, and cases cited; *Collins v. Townsend*, 58 Cal. 608; *Bohall v. Diller*, 41 Cal. 533. In the case at bar there is not even any averment or proof of a rescission of the contract, or of any attempt to rescind, to say nothing of the absence of averment or proof of tender or offer to return to defendant anything of value received from her. And under the authorities above cited, this defect in plaintiff's case is fatal.

The exceptions taken to rulings of the court on the admissibility of evidence relate to the question whether the alleged contract about bidding at the sale was in fact made, and to the issue of the adequacy of the price, and are not, therefore, under the views above expressed, important. For the reasons above given, we see no sufficient cause to reverse the judgment of the superior court.

Judgment and order affirmed.

FRAUDULENT CONVEYANCE—INADEQUACY OF PURCHASE PRICE.—The mere inadequacy of a consideration will not render the sale of property fraudulent: *Shay v. Wheeler*, 69 Mich. 254; *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210; 17 Am. St. Rep. 131; but see note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739. And this rule applies to judicial sales: *Weaver v. Nugent*, 72 Tex. 272; 13 Am. St. Rep. 793, and particularly cases cited in note.

RESCISSION OF CONTRACT OF SALE—DUTY OF THE VENDOR.—A vendor seeking to rescind a contract of sale must place the purchaser *in statu quo*, by returning or tendering the purchase price paid to him: Note to *Johnson v. Evans*, 50 Am. Dec. 674, 675; *Westhafer v. Patterson*, 120 Ind. 459; 16 Am. St. Rep. 330, and note; *Ellsworth v. Randall*, 78 Iowa, 141; 16 Am. St. Rep. 425.

RESCISSION OF CONTRACT OF SALE, WHEN MUST BE MADE. — Where a vendor seeks to rescind a contract of sale for fraud, he must act promptly upon the discovery of the fraud: Note to *Johnson v. Evans*, 50 Am. Dec. 675; *Great West Mining Co. v. Mining Co.*, 12 Col. 46; 13 Am. St. Rep. 204; for long delay on the part of one setting up fraud, after a full knowledge of the facts, constitutes gross laches, and will bar his right to rescind: Note to *Bell v. Hudson*, 2 Am. St. Rep. 801, 802.

[IN BANK.]

OHM v. SUPERIOR COURT OF SAN FRANCISCO.

[85 CALIFORNIA, 545.]

ESTATES OF DECEDENTS — WHO IS NOT CREDITOR OF ESTATE. — A person whose claim against an estate has been disallowed by the administrator, and for the establishment of which, as a claim, an action is pending and undetermined, is not a creditor within the meaning of section 1590 of the California Code of Civil Procedure, providing for suits in certain cases by executors and administrators to set aside fraudulent conveyances on application of creditors.

ESTATES OF DECEDENTS — CREDITOR'S SUIT TO SET ASIDE DEED — STATUTE OF LIMITATIONS. — To enable a creditor of an estate to maintain suit to set aside as fraudulent and void a deed made by the intestate, he must be a creditor whose claim has been allowed by the administrator, or is evidenced by a judgment; and the statute of limitations does not bar an action by the creditor until three years after the judgment establishing his claim.

ESTATES OF DECEDENTS — CERTIORARI TO ANNUL ORDER MADE WITHOUT AUTHORITY. — An order of a trial court directing an alleged creditor of an estate to prosecute an action in the name of the administrator to set aside as void a conveyance by the intestate is without authority of law, and may be reviewed and annulled on *certiorari*.

ESTATES OF DECEDENTS — CREDITOR'S SUIT TO SET ASIDE CONVEYANCE — REMEDY OF CREDITOR. — A creditor of an estate has his remedy by action in his own name, independently of the administrator, to set aside as void a conveyance made by the intestate; or the court may compel the administrator to bring the suit in a proper case, and compel obedience to its mandate by punishing him for contempt, upon his refusal to sue; or it may revoke his letters and appoint an administrator who will prosecute the action.

W. C. Belcher, for the petitioner.

PATERSON, J. The petitioner is administratrix of the estate of E. F. Ohm, deceased. On March 23, 1889, Mrs. Judge filed a petition in the superior court asking for an order directing the administratrix to allow her name to be used in an action to be brought against the surviving wife of the deceased (Augusta L. Ohm) to set aside a conveyance of certain land made by E. F. Ohm in his lifetime to his said wife, with in-

tent to defraud his creditors. It was alleged that at the time of the conveyance E. F. was indebted to sundry persons in the sum of about ninety thousand dollars, including a debt to petitioner of about five thousand dollars; that the conveyance was made without consideration and to defraud creditors; that deceased left no estate—except what was conveyed to his wife as aforesaid—with which to pay the claims of creditors; that the administratrix, though requested to do so, refused to bring suit to set aside the conveyance.

A hearing was had upon the allegations of the petition, and the court ordered that Mrs. Judge be allowed to sue in the name of Anna A. Ohm, the administratrix, on condition that Mrs. Judge defray all expenses of the action, and save the administratrix harmless therefrom. Thereupon the administratrix filed a petition herein for a writ of review, the writ was issued, a return has been made setting forth the facts substantially as narrated above, and showing the additional facts in a bill of exceptions, which is made a part of the return; that in due time Mrs. Judge presented her claim against the estate for over five thousand dollars; that the claim was rejected, and that she commenced an action against the administratrix on said rejected claim, which action is still pending.

The question is presented, therefore, whether a person whose claim has been disallowed by the administratrix, and for the establishment of which, as a claim, an action is pending and undetermined, is a creditor within the meaning of section 1590 of the Code of Civil Procedure. That section reads as follows: "No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the court, or judge thereof, shall direct." Under the provisions of this section, and the provisions of sections 1589 and 1591 of the Code of Civil Procedure, it is clear that the administratrix would have no right to commence an action to set aside a deed of her intestate as void against creditors, unless "there is a deficiency of assets" (sec. 1589), and there are creditors for whose benefit "all real estate so recovered must be sold": Sec. 1591. Any creditor is entitled to maintain an action to set aside such a fraudulent conveyance: *Hills v. Sherwood*, 48 Cal. 392; but he must be a creditor whose claim has been allowed

by the administrator, or is evidenced by a judgment: *Mesmer v. Jenkins*, 61 Cal. 153; *McMinn v. Whelan*, 27 Cal. 300. And the statute of limitations does not bar an action by the creditor until three years after the judgment establishing the creditor's claim: *Forde v. Exempt Fire Co.*, 50 Cal. 302.

In New York it is held that the debt must be ascertained by judgment, and that the reason of the rule "does not fail by the death of the debtor before judgment recovered for the debt": *Estes v. Wilcox*, 67 N. Y. 264. And in Michigan, under statutes similar to our own, it has been decided that until the estate has been charged with claims by allowance or judgment, "there is no basis for a bill against a decedent's fraudulent conveyance in order to recover means to pay them": *O'Connor v. Boylan*, 49 Mich. 209. To the same effect is the decision of the court in *Fletcher v. Holmes*, 40 Me. 364.

It is claimed that the order cannot be annulled in this proceeding; that the court below had jurisdiction of the subject-matter and of the parties, and if it decided wrongfully on the evidence adduced at the hearing, it is a case of mere error, and review will not lie.

If the order of the court directed the administratrix to commence an action, it would be conclusively presumed that the evidence taken by the court was sufficient to support the order. The order, however, is not that the administratrix herself commence and prosecute the action, but that Mrs. Judge do so in the name of the administratrix. This gives to Mrs. Judge, one of the alleged creditors, control of an action in the name of the representative of all who are interested in the estate, — heirs as well as creditors. We are unable to find any warrant in the statute for such authority, and no case has been cited which upholds it. There certainly is no necessity for such action. The creditor may bring an action in his own name. The statute does not exclude him; he has his remedy independently of the administrator: *Hills v. Sherwood*, 48 Cal. 392. Furthermore, the court can compel the administratrix to bring suit in a proper case. The statute declares that "the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same": Sec. 1589. Obedience to this mandate and the order of the court may be compelled by proceedings for contempt, or the letters may be revoked and an administrator appointed who will prosecute a proper action.

The order of the court under review herein is annulled.

CREDITORS' SUIT. — As to what is necessary to maintain a suit by creditors, when the debtor is dead or insolvent, see *Lyons v. Murray*, 95 Mo. 23; 6 Am. St. Rep. 17, and cases cited in note. Equity has jurisdiction to set aside fraudulent conveyances of a decedent, at the instance of the creditors of the estate: *Snodgrass v. Andrews*, 30 Miss. 472; 64 Am. Dec. 169; but the creditors must have obtained a judgment against the debtor: *Logan v. Logan*, 22 Fla. 561; *Massey v. Gorton*, 12 Minn. 145; 90 Am. Dec. 287, and note 288-301, upon the remedy by creditors' bills, generally. And it has been decided that the allowance of a creditor's claim against a decedent's estate is a judicial act, and amounts to a *quasi* judgment: Note to *Moore v. Hillebrant*, 65 Am. Dec. 122. The executor or administrator represents the creditors as well as the estate, and may sue for property fraudulently alienated by the deceased in his lifetime: Note to *Massey v. Gorton*, 90 Am. Dec. 291; *Hangen v. Hachemeister*, 114 N. Y. 566; 11 Am. St. Rep. 691.

[IN BANK.]

EX PARTE BARRY.

[85 CALIFORNIA, 603.]

CONTEMPT. — **NEWSPAPER PUBLICATION** charging a judge with "deliberate lying about the law, deliberate intentional falsification in his official capacity, and deliberate intentional denial of justice" in a case before him, in which a demurrer to the complaint has been sustained with leave to amend, and before the time for amendment has expired and the case finally disposed of, is a flagrant abuse of the liberty of the press, an "unlawful interference with the proceedings of a court," and a contempt of court, within the meaning of subdivision 9 of section 1209, California Code of Civil Procedure.

CONTEMPT. — **LIBERTY OF THE PRESS** to fairly criticise the official conduct of a judge, or the decisions or proceedings of courts, and to expose any wrongful, corrupt, or improper act of a judicial officer, will be carefully preserved and protected by the courts; but if a newspaper publisher prints and circulates unjust censures, or false charges concerning such matters, he will be held strictly accountable, and punished for contempt.

APPLICATION for a writ of *habeas corpus*.

P. Reddy, James G. Maguire, and E. P. Cole, for the petitioner.

J. A. Hosmer, E. F. Preston, and William M. Fitzmaurice, for the respondent.

WORKS, J. This is an application for a writ of *habeas corpus*. The following affidavit was filed in the superior court of the city and county of San Francisco charging the petitioner with contempt of court: —

“ State of California, }
“ City and County of San Francisco. }

“ William J. Dixon, being duly sworn, deposes and says that one Henry Bingham is the defendant in an action wherein the people of the state of California, upon the relation of Charles J. Swift, is plaintiff; that said action is now pending in the superior court of the city and county of San Francisco, state of California, and is still undetermined; that said Henry Bingham did interpose and file a demurrer to the complaint in said action, which said demurrer was, after full argument, on the second day of August, 1889, by the said court sustained, and on said last-mentioned day the said plaintiff was given leave to amend his said complaint within ten days thereafter; that the time granted said plaintiff by said court to amend his said complaint has not yet expired; that one James H. Barry is the editor of a paper published weekly in the city and county of San Francisco, state of California, which said paper is called the Weekly Star; that on the third day of August, 1889, and while said action was then and there pending in said superior court, said James H. Barry did publish and caused to be published at the city and county of San Francisco, state of California, in the said paper, the Weekly Star, the following false, malicious, untrue, libelous, and defamatory matter of and concerning Honorable F. W. Lawler, judge of the superior court of the said city and county of San Francisco, state of California: —

“ ‘A CRIMINAL JUDGE.

“ ‘We charge Francis W. Lawler, judge of the superior court of San Francisco, with deliberate lying about the law, deliberate intentional falsification in his official capacity, and deliberate intentional denial of justice. He is not merely a fool, but an impudent rascal; a criminal on the bench. He ought to be impeached and removed from office, and disfranchised, indicted, and punished by fine and imprisonment; made a convict of. But our criminal machinery and our legislature are so often elected and used (just as Lawler acts), not to punish wrong-doing, but on purpose to protect it, that such a proceeding is hopeless. If the information which we have received is wrong, let the editors of the Weekly Star be at once arrested on a charge of criminal libel. We invite and defy Lawler to venture to defend himself even in a San Francisco court by this proceeding. We shall make the crime of this

judge so plain, that even the wayfaring men, though fools, shall not err therein.

“The case is this: A suit has been brought against Supervisor Henry Bingham, to determine whether he is entitled to the office of supervisor. This suit was assigned by the Buckley judge, Levy, to the other Buckley judge, Lawler (upon which every lawyer in town knew beforehand what Lawler would do, though they could not have foreseen just how he would begin to do it). When the case came up before Lawler, yesterday, Bingham’s attorney “demurred,”—that is, he said the superior court had [no] authority to try a case like this. In reply, the complainant’s attorney showed that the constitution expressly provides that the superior court has jurisdiction over all such cases. And this impudent falsifier of the law and denier of justice, Francis W. Lawler, allowed the demurrer, absolutely giving for a reason, that “although the constitution does give the superior court jurisdiction over all such cases, yet this is not all cases, but only one case, and therefore this court has no jurisdiction over it.”

“This seems impossible. But we affirm it to be true, and upon the affirmation we are deliberately taking the risk of being publicly dishonored, unless Judge Lawler remains publicly dishonored. It is exactly as if the burglar Jimmy Hope had been discharged by Judge Toohy without trial, on the ground that the “law only provided for the trying of all burglars, and therefore did not provide for trying this one,”— . . . with intent then and there unlawfully to interfere with the proceedings of a court of justice, and to insult the said Francis W. Lawler, Esquire, judge of said court, in the discharge of the duties of his office, and to expose him to obloquy and contempt.

W. J. DIXON.

“Subscribed and sworn to before me this ninth day of August, 1889. GEORGE H. PIPPY, Deputy County Clerk.”

Upon the affidavit being filed, the matter was referred for hearing to Honorables William T. Wallace, J. McM. Shafter, and J. P. Hoge, judges of said court, who heard the same, found the petitioner guilty, and adjudged that he be imprisoned in the county jail for the term of five days and pay a fine of five hundred dollars.

The petitioner contends that there were certain defects in the manner of charging and bringing him before the court. But we think there were no such defects in the proceedings as would entitle the petitioner to his discharge.

Again, it is contended that the publication of the article above set out was not a contempt of court, because the case of *People v. Bingham*, therein referred to, had been finally disposed of, and therefore the language used could not in any way affect or interfere with the proceedings of the court in said action. But the affidavit shows that the action was still pending and undisposed of. A demurrer to the complaint had been sustained, with leave to amend. The time for amendment had not yet expired. A mere formal amendment might have been made, and the same question as to the merits again presented. The language used was well calculated to intimidate or improperly influence a timid judge, or one unduly sensitive to public feeling or censure.

It seems to us to be too clear for argument that the publication was made at such a time as to affect, or have a tendency to affect, the proceeding then pending in court, and this contention of the petitioner cannot prevail. The act complained of was an "unlawful interference with the proceedings of a court," and therefore within subdivision 9 of section 1209 of the Code of Civil Procedure. This being so, the citation of other authorities to support the contention of respondent, that the publication of the article was a contempt of court, is unnecessary.

We do not understand the learned counsel for the petitioner to attempt to justify the language used in this publication, but much is said about the liberty of speech and of the press. It is said, in broad language: "The liberty of speech and of the press is unlimited and unrestrained upon all subjects whatsoever, whether it be the decision of the court or the character of the judge. The only check upon this liberty is the responsibility for the abuse of it."

This may be true in the sense that the liberty to speak and write on any subject cannot be restricted or prevented in advance, and that the only remedy is to punish subsequently, for any publication that amounts to an abuse of such liberty. That is precisely what has been done in this case. If the language used was improper, but affected the judge in his individual capacity, and was not an interference with the proceedings of the court over which he was presiding, the remedy could not be by a proceeding for contempt. So the question is twofold. Was the publication an abuse of the liberty of the press? and if so, was it an interference with the proceedings of the court? The last of these we have already determined.

As to the former, the liberty of the press to fairly criticise the official conduct of a judge or the decisions or proceedings of the courts, and to expose and bring to light any wrongful, corrupt, or improper act of a judicial officer, is one that should be carefully preserved and protected by the courts. If a public supervision and censure, through the press or otherwise, is necessary to suppress corruption and keep the channels of justice pure and untainted, the right to exercise such supervision, and to censure and expose wrong-doing, should be and must be upheld by the courts. But the publisher of a newspaper who assumes to criticise or censure a public officer or the proceedings of a court must know whereof he speaks. If he censures unjustly or charges falsely, he must be held strictly accountable. While his right of free speech is protected, his abuse of it must be punished. The great trouble with the freedom of the press at the present day, so far as it affects the courts, is, that it is used indiscriminately in many cases, not with the laudable purpose of correcting abuses and exposing wrong-doing, but to gratify ill-will and passion, or pander to the passions or prejudices of others. This tendency should be severely condemned and punished, not only for the protection of the courts and the preservation of a pure and independent judiciary, but as a means of upholding the liberty of the press in its true sense.

The publication complained of here was a most flagrant abuse of the liberty of the press, and was justly punished as such.

Certain technical objections to the proceedings of the court below, including the form of the judgment, are raised and discussed at some length by the petitioner, but none of them are well taken.

Writ denied, and prisoner remanded.

CONTEMPT — PUBLICATIONS IN NEWSPAPERS. — Publications in newspapers commenting upon proceedings pending in court which reflect upon the judge, jury, or parties, or impugn the motives of the court constitute contempt: *Myers v. State*, 46 Ohio St. 473; 15 Am. St. Rep. 638, and note. Compare also *In re Pryor*, 18 Kan. 72; 26 Am. Rep. 747, and note 752, 753; note to *Matter of Sturoc*, 97 Am. Dec. 630-632. While a cause is pending in court, the judge must not be interfered with in his proceedings therein; and an interference on the part of a newspaper, charging perjury, bribery, corruption, or evil motives, is punishable as contempt: *Cooper v. People*, 13 Col. 373.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

PATRICK v. McMANUS.

[14 COLORADO, 65.]

SHAM PLEADING IS ONE GOOD IN FORM, BUT FALSE IN FACT; one entered for the mere purpose of delay, concerning a matter which the pleader knows to be false.

ANSWER OR COUNTERCLAIM MAY BE STRICKEN OUT AS SHAM, upon affidavits showing that it is false, where such affidavit is not contradicted in material respects by counter-affidavits; but if there is conflicting evidence regarding the truth of the defense, it cannot be stricken out; for a trial before the court upon affidavits cannot be substituted for a jury trial in the ordinary mode.

ACTION on a promissory note, which was set out *in hæc verba* in the complaint. The defendant, by his answer, pleaded payment, and alleged that he had laid out and expended, for the use and benefit of plaintiff, and at her request, the sum of fifteen hundred dollars, and prayed judgment against the plaintiff in the sum of five hundred dollars, and interest, and that the promissory note be delivered up to the court for cancellation. The plaintiff moved to strike this answer from the files, and for judgment on the pleadings, on the ground that "the said answer is a sham answer, as fully appears by the answer itself, and by the affidavit hereto annexed, and made a part of this motion." Two affidavits were presented in support of plaintiff's motion. One was by one of plaintiff's attorneys, and stated that before the commencement of the action, he sent a notice to the defendant requesting him to call and pay the note, and that the defendant did call, and being shown the note and requested to pay it, admitted

it to be his and that he owed it, and said that he would pay it if granted an extension of five or six months. The other affidavit on behalf of the plaintiff was made by herself, and set forth the execution and delivery of the note, and that neither defendant nor any one for him had ever paid any part of it, and that the defendant had never at any time laid out or expended any moneys whatever at her request or for her benefit. The affidavit read on the hearing of the motion on behalf of the defendant admitted that he promised to pay the note to the plaintiff's attorney, but stated that he, at the time of making such promise, claimed to have set-offs against the note more than sufficient to pay it, and that if he were sued on the note, he would interpose such set-offs in defense; that whether or not his counterclaim constituted a good cause of action was a question of law, and for the court and jury to pass upon; and that defendant makes his counterclaim, and insists upon a trial of the same. The plaintiff's motion was sustained by the court, and judgment thereupon entered in his favor, as prayed for in the complaint. The defendant thereupon appealed.

J. N. Hughes, for the appellant.

J. F. Shaffroth, for the appellee.

HAYT, J. The answer filed in the cause was stricken out as a sham answer, and judgment thereupon entered for the plaintiff for the amount claimed in the complaint. Should such action of the court be sustained?

Whether the pleading was objectionable for other reasons than the one urged is not material. Appellee's motion was based solely upon the claim that the answer was a sham one. That part of the code relating to sham answers reads as follows: "Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, immaterial, or insufficient, may be stricken out upon motion, and upon such terms as the court, in its discretion, may impose": Sec. 61.

"Sham pleading," as defined by Chitty, is the pleading of a matter known by the party to be false, for the purpose of delay, or other unworthy object: 1 Chitty's Pleading, 567. Bliss, in his work upon code pleading, says that a "sham pleading" is one good in form, and false in fact: Sec. 422. In Bouvier's Law Dictionary, a "sham plea" is said to be one entered for the mere purpose of delay, concerning a matter

which the pleader knows to be false. It will be seen, from these definitions, that the essential element of a sham plea is its falsity; and yet it is evident that not every false plea can be stricken out upon motion supported by affidavit, as this would be to substitute a trial to the court upon affidavits for a jury trial. An examination of decided cases shows that the courts have not adopted any uniform rule in reference to the nature of answers that may be stricken out upon motion as sham.

In *Brown v. Lewis*, 10 Ind. 232, it was decided that "if an answer is valid on its face, and no facts exist peculiarly within the knowledge of the court showing it to be a sham defense, it should not be stricken out upon affidavit of its falsity." But in a subsequent case, it appearing that the defendant, in response to interrogatories, conceded his answer to the complaint to be false, it was held that it should be stricken out as sham: *Beeson v. McConnaha*, 12 Ind. 420. And this rule subsequently received the sanction of express statutory enactment: *Lowe v. Thompson*, 86 Ind. 503.

In California, a plea of payment to a suit upon a promissory note was stricken out by the trial court upon affidavits showing the falsity of such plea, and the *mala fides* of the defendants in pleading it, and such action was sustained upon appeal: *Gostorfs v. Taafe*, 18 Cal. 386. In *People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515, a defense consisting of denials of knowledge or information sufficient to form a belief as to several matters, and a qualified denial, in direct terms, of another allegation of the complaint, was stricken out as sham, the court holding that a defense otherwise good may, if false, be stricken out as sham, although duly verified, and this may now be considered as the general practice in New York: See *Corbett v. Eno*, 13 Abb. Pr. 65. So, also, in Minnesota, it has been repeatedly held that a sham answer, although verified, may be stricken out upon proof of its falsity: *Hayward v. Grant*, 13 Minn. 165; 97 Am. Dec. 228; *Barker v. Foster*, 29 Minn. 166; *Nelson Lumber Co. v. Richardson*, 31 Minn. 267.

In *Torrence v. Strong*, 4 Or. 39, it was decided that an answer good in form, and containing facts sufficient to constitute a defense, cannot be gotten rid of by demurrer, but that it may be stricken out as false. *Tharin v. Seabrook*, 6 S. C. 113, is authority for saying that objection to sham defenses ordinarily presents a question of fact to be determined on affi-

davits. If an answer is manifestly false, it may be stricken out as sham, although this power should be sparingly used, and only in cases free from doubt. It is the policy of the code "to suppress falsehood, and secure truth in the pleadings"; and as one means of securing such result, authority for striking out sham answers and defenses is given. In counties where the dockets are overburdened with causes, the temptation to interpose sham answers, for the purpose of delay only, is great; and when it clearly appears that such answers are false in fact, according to the great weight of authority and reason, the court may, upon motion, strike them out. This power must, however, be exercised with extreme caution; otherwise a trial to the court upon affidavits might be substituted for a jury trial. It cannot rightfully be exercised for the purpose of determining the truth or falsity of a defense upon conflicting evidence. The inquiry ought not to be extended in such cases further than may be necessary for the court to determine that such a conflict in fact exists; but where, as in this case, the material averments of the complaint are directly supported by affidavits positive in form, we think the defendant has no right to complain of an order requiring him to support his unverified answer by an affidavit of merits, and upon failure to comply therewith, to have his pleading stricken from the files. And it would make no difference if a portion of this answer be treated as a counterclaim, as the code provision is directed not only against sham and irrelevant defenses, but to answers as well, and the counterclaim must be considered as a part of the answer. Any other construction would permit defendants to evade the consequences of the act, and delay judgment, by interposing sham counterclaims instead of sham defenses.

It requires no argument to show that the affidavit of defendant in support of his answer in this case does not amount to an affidavit of merits. It does not deny the execution of the note. On the contrary, the due execution thereof is admitted under the pleadings, a copy of the note appearing in the complaint, and the answer thereto not having been verified. The affidavit does not state that the note has been paid. It merely alleges that, on a prior occasion, Patrick claimed that his wife had paid it. Neither does it contain an averment that plaintiff has a set-off of any kind or nature whatsoever, affiant contenting himself with the statement that he, at one time, claimed to have set-offs more than sufficient to pay

the note in full, and that if sued he would set the same up in defense. This so-called affidavit of merits is clearly insufficient; it fails to state any fact showing, or tending to show, the truth of the answer. It does not even state that the answer is interposed in good faith, or that his attorney, after being informed of the facts, has advised him that he has a meritorious defense to the action. The affidavit is so entirely lacking in the essential requisites of such a paper that the court below, in deference to well-established rules, was bound to disregard it in the determination of plaintiff's motion: *Wedderspoon v. Rogers*, 32 Cal. 569; *Kaufman v. Cooper etc. Mining Co.*, 105 Pa. St. 541; *McCracken v. First Ref. Pres. Cong.*, 111 Pa. St. 106; *King v. Stewart*, 48 Iowa, 334.

The judgment of the court below is accordingly affirmed.

SHAM PLEADING. — A sham answer may be stricken out, although verified: *Hayward v. Grant*, 13 Minn. 165; 97 Am. Dec. 228. And an answer which does not aver new matter, but merely denies knowledge sufficient to form a belief as to the several matters alleged in the complaint, though verified, may be stricken out as sham pleading: *People v. McCumber*, 18 N. Y. 315; 72 Am. Dec. 515, and note 521-526, where the right to have an answer stricken out as sham pleading is discussed at length.

FIRST NATIONAL BANK v. HUMMEL.

[14 COLORADO, 259.]

BANKS — TRUSTS — DECEASED TRUSTEE, MONEY IN HANDS OF. — The owner of money which has been received by another as his trustee, or in a fiduciary capacity, can recover it or its equivalent wherever the same can be followed, no matter what form it may take. Hence, if money has been paid to a private banker, to be by him transmitted to the party entitled thereto, and the banker suddenly dies before it is transmitted, and while it remains in his possession, but mingled with other moneys, his administrator is not entitled to retain possession thereof as assets of his estate, and is subject to an action for the recovery of the money so paid, if he refuses to pay or transmit to the owner.

MONEYS, MINGLING OF PRINCIPAL'S AND AGENT'S. — EAR-MARK IS NOT INDISPENSABLE TO ENABLE THE REAL OWNER TO ASCERTAIN HIS RIGHT TO property, or to its product or substitute. If an agent puts money collected for a principal into a chest with moneys of his own, he does not thereby make it all his own, and convert himself into a mere debtor of his principal, but the latter may claim out of the chest the sum which belonged to him before the admixture.

FIDUCIARY, RECOVERY OF MONEYS FROM. — Whenever a fiduciary relation exists, and money coming from the trust lies in the hands of a person standing in that relationship, it can be followed by the principal, and separated from any money of the wrong-doer.

TRUSTS. — DEATH OF TRUSTEE OR FIDUCIARY CANNOT INCREASE HIS ESTATE BY ADDING TO IT ALL PROPERTY IN HIS HANDS. If he has moneys received in his fiduciary capacity, which he has mingled with his own funds, they do not become a part of his estate, and his administrator must, on demand, deliver them to their owner.

TRUSTS. — STATUTE CLASSIFYING CLAIMS AGAINST THE ESTATE OF A DECEDENT, and directing the order in which such claims shall be paid, has no application to moneys in his hands at the time of his decease as a trustee or fiduciary, because he has no interest in such moneys, and the right of the owner to recover them from the administrator is not a debt or claim against the estate.

PRACTICE — PARTIES PLAINTIFF. — THE REAL PARTY IN INTEREST, within the meaning of the code requiring all actions to be prosecuted in the name of the real party in interest, is the person in whom the legal title to the claim is vested. Hence one in whose favor a draft is drawn may maintain an action to recover moneys paid thereon, though the drawer of the draft will be entitled to receive such moneys as soon as collected.

PRACTICE — PARTIES DEFENDANT. — The drawer of a draft is a proper party defendant in an action by the payee to recover moneys which have been paid to a third person, to be by him transmitted to such payee, where the drawer will be entitled to such money when recovered, and he refuses to join in the action, the provision of the code upon the subject being, "that of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants, but if the consent of any one who should have been joined as a plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint."

PRACTICE — MISJOINDER OF CAUSES OF ACTION. — A complaint showing that plaintiff is entitled to recover a sum of money for the benefit of another, and that the latter will not join in the action, and that he is therefore made a party defendant, and praying, among other things, that plaintiff be allowed a reasonable sum for his costs and expenses, and that such defendant be required to pay such sum, does not unite different causes of action.

Hugh Butler and A. B. McKinley, for the plaintiff in error.

A. H. De France, for the defendant in error.

PATTISON, C. In this case plaintiff in error seeks to review a judgment sustaining a demurrer to the complaint. It is alleged, in substance, that, June 28, 1884, Risdon borrowed from one Heatly, then a resident of Golden, the sum of twelve hundred dollars, for which he gave his note, secured by a trust deed; that the money was not paid by Heatly to Risdon at the time, but an arrangement, for the payment thereof was entered into between Heatly and Risdon and one Everett; that by the terms of the arrangement it was provided that Risdon should draw his draft at sight on Everett, at Golden, for said sum of twelve hundred dollars; that upon the receipt of the draft, Heatly should provide the money to pay it, and that thereupon Everett should transmit the sum received from Heatly

to Risdon, or make such other disposition of it as Risdon should direct; that on July 15, 1884, pursuant to the arrangement, Risdon made his draft upon Everett, "in and by which draft he directed the said F. E. Everett to pay said sum of twelve hundred dollars to this plaintiff, and said Risdon then and there delivered said draft to this plaintiff, whereby the plaintiff became entitled to receive of and from the said Everett said sum of twelve hundred dollars upon presentation and delivery of said draft"; that on the sixteenth day of July, 1884, the plaintiff sent the draft by mail to Everett, accompanied by a letter instructing him to remit the said sum of twelve hundred dollars to the German National Bank at Denver, Colorado, for the benefit of the plaintiff; that on July 17, 1884, the draft and the letter were received at the banking office of Everett, in Golden, and at or about the same time the said Heatly paid into said banking office the sum of twelve hundred dollars, being the money called for and mentioned in the draft and letter of plaintiff, and the draft was then stamped and canceled as paid; that the said sum of twelve hundred dollars was received by said Everett, or some one in his employ for him, as the money mentioned in the draft and letter, and was paid by Heatly, in pursuance of the arrangement mentioned; and that, under said arrangement, it was the duty and obligation of Everett to at once remit the said sum to the German National Bank of Denver for the credit of the plaintiff.

It is then alleged that, within a short time after the money was received, Everett suddenly died, and the bank was immediately closed, and no further business transacted therein, and that when Everett died, and when said bank was closed, the said sum of twelve hundred dollars remained in the bank, and had not been remitted to the German National Bank at Denver, as directed; that the bank was not opened thereafter.

It is further alleged that on November 12, 1884, the defendant Hummel took possession of the said banking office and its contents, and kept possession of the same; that among other effects therein, he took possession, and has since had possession, of said sum of twelve hundred dollars; that thereafter, and on November 20, 1884, plaintiff demanded of Hummel the payment and delivery of said sum of twelve hundred dollars, but that he refused to pay the same.

It is then alleged, in effect, that by the terms of the contract between plaintiff and Risdon, the plaintiff was to collect

the draft, and in case it was paid, and the amount thereof deposited in the German National Bank of Denver to the credit of the plaintiff, then plaintiff was to give Risdon credit for the sum of twelve hundred dollars; that on August 12, 1884, plaintiff informed Risdon that the draft had been paid by Heatly, but that its proceeds had not been remitted to the German National Bank of Denver, as requested; that the money was in the possession of the person in charge of Everett's property, and plaintiff then notified and requested Risdon to take early and proper steps for the recovery of the same; that Risdon refused to take such steps, and notified plaintiff that he should look to plaintiff only for said sum of money; that plaintiff requested Risdon to join as co-plaintiff in the suit; that he refused, and for that reason he was made a party defendant.

Judgment is demanded "that said Hummel deliver and pay over to the plaintiff said sum of twelve hundred dollars, together with interest thereon at the rate of ten per cent per annum from said twentieth day of November, 1884, and costs."

There is also an additional prayer, in the following language: "And demands judgment against John S. Risdon, that he pay plaintiff a reasonable sum of money, sufficient to reimburse plaintiff for all costs and expenses paid and incurred in the prosecution and maintenance of this suit, and for the recovery of said money; that he be adjudged the owner of said sum of twelve hundred dollars, less the expense of collection so found as aforesaid; and that plaintiff be released from any and all liability to said John S. Risdon by reason of making presentation and payment of said draft as aforesaid, and of all the other facts hereinbefore set forth."

To this complaint the defendant in error demurred upon the grounds,— 1. That the complaint did not state facts sufficient to constitute a cause of action; 2. That there is misjoinder of parties defendant, etc.; 3. That several causes of action have been improperly united, etc.; 4. That the causes of action so improperly united are not separately stated.

The demurrer was sustained. Plaintiff in error "elected to abide by said complaint," and thereupon the judgment was rendered now sought to be reviewed.

The causes of demurrer will be considered in the order in which they have been stated.

First, then, are the facts alleged sufficient to constitute a

cause of action against the defendant in error? In other words, upon the facts stated, is plaintiff entitled to the judgment demanded, or to any judgment or relief in the premises whatever?

In the discussion of this question, it will be necessary first to define the relation of the several parties to the fund in question. That relation must be determined from the facts as alleged in the complaint. The facts, then, are, that on June 28, 1884, Heatly agreed to loan to Risdon twelve hundred dollars. On that day Risdon made his note, and delivered the same to Heatly. The money to be loaned was not paid over by Heatly to Risdon. It was arranged that on July 15th following Risdon should be paid by Heatly. To accomplish this, it was agreed between Heatly, Everett, and Risdon that on the day named Risdon should draw a draft on Everett, which Everett should pay if Heatly provided the funds for payment. Pursuant to the arrangement, Risdon drew his draft upon Everett, and delivered it to the plaintiff. It is a fair inference from the allegations of the complaint that the draft was payable to the order of the plaintiff. The plaintiff sent the draft to Everett, with instructions that when Heatly paid the money to him, he (Everett) should transmit the money received from Heatly to the German National Bank, for the credit of the plaintiff.

Upon this state of facts, the relations between the several parties are clear and well defined. Risdon made the plaintiff in error his agent to obtain the fund in question. The plaintiff made Everett its agent to receive the fund from Heatly. When he received the fund, it was his duty to transmit the identical money received to the German National Bank, for the credit of the plaintiff. When the money was paid by Heatly to Everett, therefore, the title to the fund was vested in the plaintiff. The beneficial ownership was vested in Risdon; Everett had no title or interest in the money, or any part of it. His failure, therefore, to transmit the money received from Heatly to the German National Bank was a violation of the duty he owed the plaintiff and Risdon. When he received the money, it became the money of the plaintiff and Risdon. When he died, the fund was their property, and was their property when received by defendant in error.

The question presented upon these facts is, whether this sum of twelve hundred dollars can be recovered. The action is brought against the defendant in error individually. It will

be assumed, however, that the fund was taken by him as the personal representative of the decedent. The case will first be considered without reference to the statute of this state relating to the administration of estates of deceased persons. It was conceded by counsel for defendant in error, upon the oral argument, that if this specific sum of twelve hundred dollars could be identified in any way, then the action could be maintained. But it was insisted, if the fund when received was mingled with other funds belonging to decedent, so that its identity was lost, then, and in that event, no action could be maintained to recover it. This proposition was predicated upon the principle that money, as such, cannot be recovered, because, in the language of the books, it has no "ear-mark" by which it can be distinguished. If this principle can be successfully invoked in this case, then a fund to which decedent had no title, and in which he had no beneficial interest whatever, became a part of the body of his estate to be distributed among the general creditors. If the estate of Everett is insolvent, such a result would not only be inequitable and unjust, but a reproach to the law.

It is undoubtedly true that the principle contended for was at one time so well settled as to be elementary. It is clearly stated in Schouler on Executors, section 205. Attention is only called to two clauses of this section: "Only those things in which the decedent had a beneficial interest at his death are assets, and not those which he holds in trust, or as the bailee or factor of another. In order, however, that the third party or new fiduciary may claim his specific thing as separable from assets, its identity should have been preserved; and the rule is, that if the deceased held money or other property in his hands belonging to others, whether in trust or otherwise, and it has no ear-mark, and is not distinguishable from the mass of his own property, it falls within the description of 'assets,' in which case the other party must come in as a general creditor." In support of the proposition last quoted, the author cites two cases: *Trecothick v. Austin*, 4 Mason, 29; *Johnson v. Ames*, 11 Pick. 172. The first case was decided in 1825; the second, in 1831.

It is needless to trace the development of the law, which has resulted in a radical change in the principle stated since these decisions were made. At this time the owner of money which has been received by another as trustee, or in any fiduciary capacity, can undoubtedly recover the money or its

equivalent whenever the same can be followed, no matter what form it may take.

The departure from the rigid doctrine of "ear-mark" or identification of money, to entitle the owner to recover, seems to have been first initiated in England. As the English cases cited have been very generally followed by the courts of this country, attention will be first called to them. The case of *Pennell v. Deffell*, 4 De Gex, M. & G. 372, was a controversy between creditors and the administratrix of one George Green, who in his lifetime was one of the official assignees of the court of bankruptcy. It is only necessary to say that in the course of the administration of his office the deceased was accustomed to mingle trust funds with his own, and to deposit the same in bank.

In the discussion of the proposition in question, Lord Justice Knight Bruce uses the following hypothesis: "Thus let me suppose that the several sums for which, as I have said, Mr. Green was accountable at the time of his death, had been (that is to say, that the very coins and the very notes received by him on account of the trusts, respectively, had been) placed by him together in a particular repository, such as a chest, mixed confusedly together as among themselves, but in a state of clear and distinct separation from everything else, and had so remained at his death. It is, I apprehend, certain that after his death the coins and notes thus circumstanced would not have formed part of his general assets — would not have been permitted so to be used — but would have been specifically applicable to the purposes of the trusts on account of which he had received them. Suppose the case that I have just suggested to be varied only by the fact that in the same chest with these coins and notes Mr. Green had placed money of his own, — in every sense his own, — of a known amount, had never taken it out again, but had so mixed and blended it with the rest of the contents of the chest that the particular coins or notes of which this money of his own consisted could not be pointed out, — could not be identified. What difference would that make? None, as I apprehend, except, if it is an exception, that his executors would possibly be entitled to receive from the contents of the repository an amount equal to the ascertained amount of the money in every sense his own, so mixed by himself with the other money. But not in either case, as I conceive, would the blending together of the trust moneys, however confusedly,

be of any moment as between the various *cestuis que trustent* on the one hand, and the executors, as representing the general creditors, on the other.

In the same case Lord Justice Turner said: "It is, I apprehend, an undoubted principle of this court that as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subjected to or affected by the trust."

Again, in *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, a most exhaustive discussion of this question is found. At page 710, Jessel, master of the rolls, said: "Now, that being the established doctrine of equity on this point, I will take the case of the pure bailee. If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other moneys. I have only to advert to one other point, and that is this: Supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the trustee, using the term again in its full sense, as including every person in a fiduciary relation, does it make any difference, according to the modern doctrine of equity? I say, none."

At page 723, Theisiger, L. J., said: "There is no doubt that there are to be found, here and there, in the books, *dicta*, principally of common-law judges, which would appear to militate against the generality of that proposition, and which would appear to show that in the minds of those judges there was the view that while chattels might be followed, or money so long as it could be looked upon as a specific chattel, as moneys numbered and placed in a bag, yet when those moneys had been mixed with other moneys, that there was no ear-mark, and neither at law nor in equity could they be followed. With reference, however, to those *dicta*, it appears to me there are two observations to be made. In the first place, I cannot find any decision which has followed out those *dicta* to their consequence, assuming that those *dicta* are to be treated as having the generality which at first sight attaches to them; and in the second place, it appears to me that in many cases those *dicta*, looking to the facts of the particular

case, may be restrained to those facts, and possibly may have a more limited meaning than that which has been attached to them by Mr. Justice Fry in the case of *Ex parte Dale*, L. R. 11 Ch. Div. 772, or by the master of the rolls in his judgment in the present case. As far as I can judge, the only exception to the general proposition which I have stated is not a real exception, but an apparent exception; for all cases where it has been held that moneys mixed and confounded, but still existing, in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty, in reference to the moneys themselves, beyond the ordinary duty of a man to pay his debts. In other words, that they were cases in which the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que trust*, or principal and agent."

At page 713, *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, the master of the rolls says: "Now, let us see, therefore, what *Whitecomb v. Jacob* decides. It decides that the equity as to following the proceeds attaches to the case of a factor as well as to the case of *cestui que trust* and trustee. That is what it decides; but it decides, secondly, that you could not follow money, because it had no ear-mark. The first part is good law at the present day; the second is not. Whether it was a good law or not at the time of *Salkeld*, it is immaterial to consider. It is very doubtful whether equity had got quite so far at that date as since, and therefore I will not say it was not; but it is not so now."

This case is cited with approval in *National Bank v. Insurance Co.*, 104 U. S. 54, in which this and many of the English cases are reviewed. In the *syllabus* of the case last cited the rule is stated as follows: "As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property": *Van Alen v. American Nat. Bank*, 52 N. Y. 1.

Again, in *Farmers' etc. Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215, it is held: "Equity will follow a fund through any

number of transmutations, and preserve it for the owners, so long as it can be identified, no matter in whose name the legal right stands." Strong, J., says: "But it is insisted there was no ear-mark to the money. What of that, if the money can be followed, or if it can be traced into a substitute? This is often done through the aid of an ear-mark. But that is only an index enabling a beneficial owner to follow his property. It is no evidence of ownership. An ear-mark is not indispensable to enable a real owner to assert his right to property, or to its product or substitute. Evidence of substantial identity may be attached to the thing itself, or it may be extraneous. It is freely admitted that if a trustee or agent receive money of a *cestui que trust* or principal, and mingle it with his own so that it cannot be followed, the *cestui que trust* or principal cannot recover it specifically. This is not because the ownership is changed, but because a court cannot lay hold of the property as that of the owner. But in regard to money, substantial identity is not oneness of pieces of coin or of bank bills. If an agent to collect money puts the money collected into a chest where he has money of his own, he does not thereby make it all his own, and convert himself into a mere debtor to his principal. The principal may, by the law, claim out of the chest the sums which belonged to him before the admixture: *Pennell v. Deffell*, 4 De Gex, M. & G. 372.

In *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, Horton, C. J., says: "Counsel suggest: 'If there was a trust created, there must have been a *cestui que trust*, and that if any one is entitled to follow and reclaim the money, it must be the owner and holder of the note of plaintiff.' It does not make any difference that, instead of trustee and *cestui que trust*, the case is one of fiduciary relationship. If a wrong arises out of such relationship, the same remedy exists against the wrong-doer on behalf of the principal as exists against a trustee on behalf of the *cestui que trust*. Wherever a fiduciary relationship exists, and money coming from the trust lies in the hands of the person standing in that relationship, it can be followed by the principal, and separated from any money of the wrong-doer."

In *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, the rule contended for by counsel for defendant in error was, after a careful discussion by Cole, C. J., practically repudiated. The proposition decided is thus stated in the *syllabus*: "M. left with H., a banker, for collection, a draft upon a New York

bank. H. sent the draft to a bank in Chicago, received credit for the amount, and afterwards made drafts upon such bank, which were cashed. Before payment to M., H. made an assignment for the benefit of creditors. At that time nothing was due him from the Chicago bank. Held, that the proceeds of the draft were a trust fund in the hands of H., and that, as against other creditors, M. might enforce full payment from the assets in the hands of the assignee, although the trust fund could not be traced to any specific property": *People v. City Bank of Rochester*, 96 N. Y. 32.

No one of the cases cited differs in principle from the case at bar. Suppose the money in question had been placed by Everett in his own pocket, with a mass of other funds belonging to himself, and that he had then died. Suppose that immediately upon his death the mass of currency had been taken into the possession of the defendant in error. If demand had then been made by the plaintiff for the money, could defendant in error have required the plaintiff in error to designate the particular bills which were claimed as a condition of the right to recover them? Certainly not. How does the case supposed differ from the case at bar? It is alleged that the money was paid to Everett, received and retained by him; that it was in his possession at the time of his death; that the same sum came to the possession of the defendant in error. Is it not clear that Everett received the fund in a fiduciary capacity? Does it not follow that the instant it passed into his hands a trust arose, by operation of law, in favor of plaintiff in error? Did not the trust follow the fund when it passed to the hands of defendant in error? If it was mingled with the assets of the decedent, is not the estate impressed with the same trust? Can it be possible that the fact of death increases a man's estate by adding thereto all property which may be in his hands? Can a man, by an abuse of trust or violation of his fiduciary relations, acquire moneys for distribution among his general creditors at his decease? Whatever may have been the law applicable to these questions in the past, it is clear that at the present time the estate of no man can be increased by a wrong committed by him under the circumstances set forth in the complaint in this case.

Is the conclusion reached in any wise affected by sections 126 and 136 of the statute of this state relating to wills and administration of estates? It will be observed in this connec-

tion that the question at issue is one of title. The conclusion already reached is, that at the time of the death of Everett the title to the fund in controversy was in the plaintiff in error; that Everett had no beneficial interest therein whatever. The fund, therefore, constituted no part of his estate: Schouler on Executors, sec. 205.

It is contended by defendant in error, however, that the sections of the statute cited have the effect, in law, to convert the fund in question into assets by their operation in the classification of claims, and the order of their payment. The third subdivision of section 126 provides that "where any executor, administrator, or guardian has received money as such, his executor or administrator shall pay out of his estate the amount thus received and not accounted for, which shall compose the third class." The fourth subdivision provides that "all other debts and demands, of whatsoever kind, without regard to quality or dignity, which shall be exhibited within one year from the granting of letters as aforesaid, shall compose the fourth class." Section 136 relates to the order of payment, and requires that claims be paid according to the classification contained in section 126.

It is claimed, first, that the fund in question does not belong to the third class, because debts of the third class are limited to moneys which have been received by the decedent as executor, administrator, or guardian. This is undoubtedly true. As a natural sequence, it is argued that the demand in issue in this suit is a debt, and belongs to the fourth class. If the plaintiff in error was proceeding against the defendant in error as a general creditor, then, as a matter of course, the position of defendant in error would be correct. Such, however, is not the case. The relation of debtor and creditor, as between plaintiff in error and Everett, never existed. The statute therefore has no application. The ultimate fact upon which the right of action in the case at bar is predicated is, that the funds in question were never the property of Everett at all; that neither the legal title nor the beneficiary interest vested in him; that the identical fund was in his possession at the time of his death, and that the same fund came to the defendant.

Prior to 1872, the provision of the statute of Illinois classifying claims against the estate of a deceased person was identical in language with that of this state. In the year last mentioned the legislature of Illinois amended that provision so

that it reads as follows: "6. Where the decedent has received money in trust for any purpose, his executor or administrator shall pay out of his estate the amount thus received and not accounted for." In the case of *Wilson v. Kirby*, 88 Ill. 566, it was held that "the clause of the statute relating to the classification of claims against estates of deceased persons, and which gives a preference in cases where the deceased has 'received money in trust for any purpose,' does not necessarily extend to and embrace every kind of trust. It does not embrace trusts implied by the law." The same case was before the supreme court of Illinois a second time, and is reported in *Kirby v. Wilson*, 98 Ill. 240. It was there held that "where a person sells the cattle of another as his agent, under a contract, and receives and retains the purchase-money until his death, it becomes the money of the owner of the cattle, as the substitute or representative of the cattle; and the fact that the widow of the person so selling, during his illness or after his death, takes such funds, and deposits the same in bank in her own name, and afterwards gives her check for the same to her husband's executor, will not destroy the identity of the fund, and make it subject to the general creditors of the testator, but the owner of the cattle so sold will have a preference over the other general creditors of the estate. In such case it is not necessary that the identical bills received by the testator should have come into the hands of his executor." Upon examination of this case it will be discovered that the decision is based upon the sole fact that the money in controversy was the money of the owners of the cattle, and that the section of the statute cited is without application, for the reason that, as was said by the court (*Wilson v. Kirby*, 88 Ill. 566), the statute does not embrace trusts implied by the law.

In the decision of this case, therefore, the provisions of our statute which have been cited should be disregarded, and the conclusion predicated upon the legal and equitable principles which have been discussed. In the light of these principles, it is clear that the complaint states a cause of action.

The next question presented is, whether John S. Risdon was improperly joined as a defendant. It is claimed that if plaintiff in error was the real party in interest, Risdon could not be properly joined either as plaintiff or defendant. The relation of the parties to each other was as follows: 1. Risdon was one of the original parties to the contract or arrangement upon which the action was predicated, to wit, the payment of twelve

hundred dollars by Heatly to Everett for him. 2. The plaintiff was the agent of Risdon for the purpose of collecting the money to be paid by Heatly to Everett, and had the legal title to the draft which was drawn, and the right in the first instance to receive the money; but Risdon was the beneficial owner of the fund. This being the relation of the parties, the question of parties plaintiff does not seem to be difficult. Section 3 of the code, which was in force when this action was brought, provides that "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided." Section 5 provides that the trustee of an express trust may bring an action without joining beneficiaries, and that a trustee of an express trust includes a person in whose name a contract is made for the benefit of another. Section 10 declares that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs." Section 12 provides that, "of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint."

The meaning of the language of the first section cited has been frequently construed by the courts. The "real party in interest" is held to mean the person in whom the legal title to the claim in suit is vested: *Bassett v. Inman*, 7 Col. 270, and cases cited. The suit, therefore, was properly brought in the name of the plaintiff. But inasmuch as Risdon was a party to the contract upon which the action was predicated, and was in fact the beneficial owner of the claim, he must be deemed to be interested in the subject of the action, within the meaning of section 10, above cited, and therefore a proper party plaintiff in the suit.

In commenting upon the section last mentioned, Pomeroy, in his work on remedies and remedial rights, at section 199, says: "The extent of the interest is not the criterion, nor its source, nor origin. If the persons have any interest, — whether complete or partial, whether absolute or contingent, whether resulting from a common share in the proceeds of the suit or arising from the stipulations of the agreement, — the language applies, without any limitation or exception, and without any distinction suggested between actions which are equitable and those which are legal." All persons standing in the relation

to the subject-matter of the action as above defined may be properly joined as plaintiffs. In this particular case, Risdon refused to unite with plaintiff, and was properly joined as defendant.

It is also contended that different causes of actions are improperly united. This position cannot be sustained, for the simple reason that no cause of action is stated against Risdon. As a part of the prayer for relief, the court is asked to allow the plaintiff a reasonable sum for its costs and expenses, and to require this amount to be paid to plaintiff by Risdon. No attempt is made to state a cause of action against him. The only allegations are those which are made in compliance with section 12 of the code, as the reason for making Risdon a party defendant. Two causes of action, therefore, are not improperly united, there being but one cause of action stated. The judgment is reversed.

ELLIOTT, J. Having heard and determined this case in the court below, I have given the foregoing opinion careful consideration. At *nisi prius* I must have overlooked some of the averments of the complaint showing that Everett was, by the previous arrangement of the parties, constituted a trustee of the particular fund paid to him by Heatly, for the express purpose of being immediately paid over to Risdon or his order. The judgment should be reversed.

PER CURIAM. For the reasons expressed in the opinion of Mr. Commissioner Pattison, the judgment of the district court is reversed, with leave to defendants below to answer the complaint.

TRUST PROPERTY. — Trust property, however changed, remains subject to the trust; trust funds mixed with those of the trustee, so long as they can be traced, will be deemed to be the property of the *cestui que trust*, no matter whether the funds were mixed with the funds of the trustee or of a third party: *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332, and note as to when trust funds may be followed. See also *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141; *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215; *Phillips v. Overfield*, 100 Mo. 466.

CONFUSION OF PERSONALTY. — For the law relating to the commingling of personal property, and the rights of the owners with respect to the mixture, see *Hall v. Pillsbury*, 43 Minn. 33; 19 Am. St. Rep. 209, and particularly note.

PLEADING — PARTIES. — The *cestui que trust* is, ordinarily, a necessary party to all actions by or against the trustee to recover trust property: *Ebell v. Bursinger*, 70 Tex. 120.

HARRINGTON v. SMITH.

[14 COLORADO, 376.]

EXECUTION, EXEMPTION FROM, NECESSITY FOR CLAIMING. — Under the statutes of Colorado declaring that certain property up to a value specified shall be exempt from levy and sale upon any execution or writ of attachment, and that if any officer shall take or seize any of the articles or property so exempt, he shall be liable for three times the value of the property illegally taken or seized, if the property levied upon by the officer is all the debtor has, and is within the exemption, he need not indicate, either directly or indirectly, that the property is exempt, nor make any demand for its exemption. If, however, the defendant has property of a certain kind in excess of the exemption, it is his duty to interpose his claim for exemption prior to the sale, provided he is notified of the levy, and is in a position to interpose such a claim.

EXECUTION — EXEMPTION, WAIVER OF. — A debtor absent in another state when informed of a levy on his exempt property, where the property is such that it is the duty of the officer not to levy upon it, does not waive his right of exemption by writing a letter to the officer levying the writ, stating that it was impossible for him to come home, and requesting postponement of the cause until a day specified, when he could come home and fix up everything satisfactorily, though he did not return at the day indicated, and the officer did not sell the property until a subsequent date.

Haynes, Dunning, and Annis, for the appellant.

T. M. Robinson, for the appellees.

RICHMOND, C. May 29, 1885, appellant was the head of a family residing in Larimer County, Colorado, a carpenter by trade, and was the owner of two bay horses, of the value of two hundred dollars; one lumber-wagon, of the value of eighty dollars; one set of double harness, of the value of twenty-five dollars; one cow and calf, of the value of fifty dollars,— which he claimed were exempt from levy of attachment and sale under an execution. Smith was constable for that county, and on that day appellee Thomas H. Davy caused a certain writ of attachment to be issued and delivered to said Smith, and directed him to take and seize the above-enumerated property. It appears that at the time of the levy, and even until after the twentieth day of June of that year, appellant was temporarily absent from the state. He seeks to recover for the triple value of the property so seized and sold.

On the thirtieth day of May, 1885, Davy wrote a letter to appellant informing him that he had attached all of his stock,— harness and wagon included. To this letter appellant replied, stating that he would return, without fail, by June 20th, and arrange everything satisfactorily, asking for a stay of proceedings.

until that date. In this letter no claim of exemption was set up, nor was the claim made by any member of his family. The sale of the property took place subsequent to the 20th of June, 1885 (the time when appellant had agreed to return and arrange matters).

In addition to the above stock seized by the sheriff, it appears that the constable levied upon four other cows and one calf belonging to appellant. There seems to be no dispute about the ownership, nor that the stock levied upon was all that appellant owned at the time, nor of the fact that he was detained and unable to reach Colorado prior to the sale under the execution.

Motion for a nonsuit was granted, and exceptions noted. Thereafter a motion for a new trial was overruled. In denying the motion for a new trial, the court said that "where the debtor knew that his property was attached while it was yet within the control of the officer, so that it could be returned to him, it was his duty to demand its return, or to give notice in some way of his disapproval of the act. But even if he might be silent and be safe under such circumstances, if he says anything or does anything in respect to the levy upon his property, it must be a disapproval of the officer's act; or else the fact that he does say something, and does not do or say anything to disapprove of the levy, should be construed into an acquiescence." The court formed its conclusion on the letter of June 9, 1885, written by appellant to his creditor, which is in words and figures as follows:—

"TUNNEL CAMP, WYO., June 9, 1885.

"THOMAS H. DAVY, Esq.

"Yours of May 30th at hand to-day. In reply, I will say that it is impossible for me to come home now, as the high water has washed out the head-gates, and the superintendent has gone to Cheyenne to get instructions from the company. If your letter had reached me one day sooner, I could have made other arrangements; but as it is, I can't do anything. I wish you would postpone the case until the 20th, and I can come down and fix up everything satisfactory. I won't leave the work until the superintendent comes home. I may not gain anything, but it is left in my charge.

"Yours,

PERRY HARRINGTON.

"Do the best you can for me, and I will pay you. I will be there on the 20th without fail."

The judge, in the trial, intimated that he based his conclusion upon the principles laid down in *Drake on Attachments*, section 244 a. The principle there announced is as follows: "The defendant, if aware of the levy, must at the time claim the exemption, or it will be considered he consents to it. Manifestly, he cannot set up such a claim after judgment rendered against him in the attachment suit." This principle is based upon Indiana authorities, which were undoubtedly influenced by the peculiar wording of the statute of that state, hereinafter referred to. The sole question for our consideration, therefore, is, whether or not the conclusions of the court were correct.

This particular question has received no direct consideration in any of the causes involving the question of exemption heretofore heard in this court. The General Statutes of this state (1883, page 601, section 32) provide as follows: "The following property, when owned by any person, being the head of a family, and residing with the same, shall be exempt from levy and sale upon any execution or writ of attachment: Working animals to the value of two hundred dollars, one cow and calf; [the] tools and implements or stock in trade of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value."

Section 34 of said act provides that "if any officer, or other person, shall take or seize any of the articles of property hereinbefore exempted from levy and sale, such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass, with costs of suit." For the purposes of this discussion, the above is all of the statute necessary to be mentioned.

It will be observed that nowhere in this statute referred to is there any language making it incumbent upon the debtor to select or point out which property he claims is exempt. Seemingly, there is great confusion in the authorities and text-writers as to what is the duty of the debtor at the time the officer seeks to levy upon the property; but a careful examination will disclose the fact to be, that this confusion is the result of the different wording of the statutes. In Indiana, the statute provides that if any execution debtor shall claim property as exempted by virtue of this act, he shall elect whether he will claim personal or real property, or both, and shall designate

the property so claimed. Undoubtedly, the decisions of Indiana are based upon this provision of that statute.

The statute of Illinois, also, provides that the debtor, under certain circumstances, shall select the property which he claims shall be exempt; and yet, notwithstanding that provision of the statute, it was held, in the case of *Cole v. Green*, 21 Ill. 104, that "where a judgment debtor has but sixty dollars' worth of property, he need not prove a formal or express selection by him of that property, in order to protect it from levy and sale on execution. If a debtor has but sixty dollars' worth of property the statute exempts it from the effect of any judgment, execution, or attachment. It is placed beyond the reach of the law, unless by the voluntary act of the owner."

The argument of the court in arriving at this conclusion is to the effect that there can be no selection where there is nothing left,—one may take the whole, but he cannot select the whole,—and that the matter of selection, under the statute, could not be made in this particular case. In such case, the statute, by its own office, sets apart the whole property to the use of the debtor, and absolutely exempts it from levy and sale on execution; and to it no judgment, execution, or attachment can exist. So far as the two horses were concerned, in the case at bar, there is no doubt, from the testimony, but what they were all that appellant had. Consequently, it would not be necessary for him to indicate, directly or indirectly, that the property was exempt. It was the duty of the officer, who is supposed to know the property exempt by the statute, to leave such property so exempt with the execution debtor.

In the case of *Howard v. Rugland*, 35 Minn. 388, it was held that "when an officer assumes to levy an execution upon and sell property which the law thus chooses and selects as exempt, the levy and sale are *per se* illegal, and the officer liable to the debtor without any demand, as is also the execution creditor who participates in the levy and sale."

Where the statute exempts a particular chattel, as a horse or a work-beast, and the debtor has but one, a selection is obviously not required, nor is the debtor required to claim the benefit of the statute. The officer must take notice of the fact that the chattel is exempt; and where an officer sold a debtor's only horse, under such circumstances, a conviction of misdemeanor under the statute was sustained against him: *State v. Haggard*, 1 Humph. 390.

In *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219, it was

held: "It is not necessary for the judgment debtor to select or point out to the officer such articles of property as are specifically exempt by law from execution."

Upon a careful examination of all the authorities, we are inclined to think, under the statute of this state, that when an execution debtor has property of a certain kind in excess of the exemption, it becomes his duty to interpose his claim of exemption prior to the sale, provided he is notified of the levy, and in a position to interpose such claim. This seems to be the rule adopted by this court in *Behymer v. Cook*, 5 Col. 399, and is undoubtedly supported by the majority of authorities of states with a similar statute. But where the execution debtor had only a precise number, or property of the exemption value, under the statute, then, and in such case, a levy and sale under an execution is absolutely illegal and without warrant, unless exemption be waived, and this is a matter of defense: *State v. Haggard*, 1 Humph. 390. In such case it is the duty of the officer to set aside such property as is already exempt, under the statute, from levy and sale.

In the particular case at bar, the court undertook or did construe the letter above recited as amounting to a waiver of the exemption rights, and granted a nonsuit. This, in our judgment, was error. The party was not present to claim the exemption until after the sale; and so far as the evidence goes, the explanation of his absence was entirely satisfactory.

In *Haswell v. Parsons*, 15 Cal. 266, 76 Am. Dec. 480, it was held: "The absence of the plaintiff . . . when the sale took place was a sufficient excuse for not claiming the exemption at the time." The purport of the letter, as we construe it, was, that he desired particularly to have time allowed him in which he might settle the demand of the execution debtor. As has already been said, the levy of the attachment was illegal. The property was absolutely exempt from levy and sale. By the express terms of the statute under which the writ was issued, the office of the process was limited to property "not exempt by law from execution": Gen. Stats., sec. 2002.

A judgment against the debtor would create no lien upon this property. The attachment levy was without force or effect. The defendant was a mere trespasser. Under such circumstances, it is clear that the owner of exempt property, either at the time the levy is made or before or after the sale pursuant to the execution, may claim his property, unless his conduct

has been such as to make it inequitable for him to assert his title. In this case, it must be assumed that the defendant knew when he seized the property that it was exempt, and that the seizure was a trespass. The silence of the plaintiff, under the circumstances, therefore, was not alone sufficient. Some of this property was undoubtedly exempt. And the court erred in determining, as a matter of law, that the letter of June 9th was sufficient to defeat a recovery.

For error in granting nonsuit, we think the judgment should be reversed, and the cause remanded for further proceedings.

EXEMPTIONS. — As to whether an exemption must be claimed, see note to *Brown v. Leitch*, 31 Am. Rep. 44-46; *Strouse v. Becker*, 38 Pa. St. 190; 80 Am. Dec. 474; *McGee v. Anderson*, 1 B. Mon. 187; 36 Am. Dec. 570; *Bernheim v. Andrews*, 65 Miss. 29.

EXEMPTIONS, WAIVER OF, BY DEBTOR. — An exemption of property from execution and attachment is deemed as waived by the failure of the debtor to claim it as exempt within a reasonable time after its seizure under process; *Stanton v. French*, 83 Cal. 194; *People v. Palmer*, 46 Ill. 398; 95 Am. Dec. 418. But see *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219, where the rule is laid down that a debtor need not select such articles of personalty as are specifically made exempt by statute.

TOWN OF LONGMONT v. PARKER.

[14 COLORADO, 386.]

HIGHWAYS. — ONE WHOSE LAND ABUTS UPON A PUBLIC STREET OR HIGHWAY, though he has no fee in the land occupied by such street or highway, has rights therein not held in common with the general public for the purposes of travel and use; and a party using or appropriating any part of the highway for other or different purposes than those contemplated, whereby it is obstructed and impaired as a means of ingress and egress, is liable to such owner for any consequent damages arising from such appropriation and use depreciating the value of the property.

HIGHWAYS. — Action may be sustained by one whose lands abut on a public highway, against a municipal corporation which excavates and maintains a ditch in such highway in front of his premises, though he has no interest in the fee of the land in which the highway is located.

F. B. Secor and B. L. Carr, for the appellant.

Kinne and Woy, for the appellee.

REED, C. Parker, the appellee, plaintiff below, claimed to be the owner of a five-acre tract of land near the town of Longmont. Upon the trial no direct proof of ownership of Parker was offered, but no objection was made on account of the kind

of proof offered and admitted, and the ownership will be regarded as conceded by appellant on the trial. Plaintiff had a brick house and some other improvements on his land near the west line of the lot, and resided in it. The lot abutted upon the east line of the public highway, sixty feet in width. The house was about twenty-five feet from the line of the road. The defendant was a municipal corporation. In the spring of 1885, some time after the occupation of plaintiff commenced, and after the erection of the house and buildings, the defendant excavated a ditch for the purpose of supplying the town with water, in the highway in front of the residence of plaintiff, on the west side of the highway, the distance from the line of plaintiff's lot to the bank of the ditch being about forty-nine feet. Directly in front of the premises of plaintiff the ditch, at its greatest width, was from fourteen to seventeen feet, and its depth about six feet or more. Plaintiff's land abutted upon the highway, no part of which had been his property, the party from whom he acquired title having dedicated the land in the highway to public use previous to the sale of the land to plaintiff.

Plaintiff brought this suit to recover damages to his property by the constructing and maintaining the ditch. It is assigned for error that the court overruled the demurrer to the complaint. On examination, we do not think the grounds of demurrer well taken, or that the court erred in the judgment upon it. It is unnecessary for an understanding of the case that the pleadings be set out in full. It is sufficient to say that the issue presented for trial was, whether the plaintiff's property had or had not been damaged by the excavation and existence of the ditch.

The case was tried to a jury. The evidence was conflicting. Several witnesses testified to damage, varying in amount from three hundred dollars to five hundred dollars; but their evidence in regard to the manner of arriving at the amount of damage, and the elements of damage going to make up the aggregate, was quite vague and indefinite. About an equal number of witnesses testified that in their opinion there was no damage. It was in evidence that the earth taken out in excavating the ditch was deposited in the road in front of the premises of plaintiff; a part of it had been removed by the defendant a short distance, and used in grading the road in front of plaintiff's property; and that this left the road higher in places than the adjoining land of plaintiff. The verdict

was found for the plaintiff for \$150, and judgment entered upon the verdict.

Considerable latitude was allowed and indulged in in the way of proof upon the trial, and some very remote and novel elements of damage introduced, but no objection appears to have been made or exceptions taken. No exception was taken and no error assigned upon the instructions given. Taken as a whole, they substantially submitted the question of damage, and the law in this state, as announced in *City of Denver v. Bayer*, 7 Col. 113, where section 15 of article 2 of the state constitution ("that private property shall not be taken or damaged for public or private use without just compensation") is carefully considered and applied; and where it was held that in a case like the present, where the land-owner had no fee in the land occupied as a highway, but his land abutted upon it, and he had rights therein not shared in common with the general public for purposes of travel and use, a party using or appropriating such highway, or a portion of it, for other and different purposes than the one contemplated, whereby the highway was obstructed and impaired as a means of ingress and egress, would be liable to the abutting land-owner for any consequential damages arising from such appropriation and use depreciating the value of the property. This application of the constitutional prohibition is well sustained by many authorities, particularly by the construction given by the English courts to the Land Clauses Consolidation Act and Railway Clauses Consolidation Act of 1845 (8 Vict., c. 18, 20). In those cases the words used are "injuriously affected," which are certainly in meaning and intention the same as the word "damaged," in our constitution. In those cases it has invariably been held that abutting owners, under circumstances like those presented in this case, could recover consequential damages to the extent of the lessened value of the property.

The case of *Beckett v. Midland R'y Co.*, L. R. 3 Com. P. 82, was tried before Cockburn, C. J. (1867). In that case the street, by an embankment, was narrowed from fifty to thirty-three feet opposite the property of the plaintiff, and upon the trial it was left to the jury to say from the evidence "whether there had been any diminution in the value of the plaintiff's house by reason of the constructing of the road in front of it." Upon review, in the opinion of Bovill, C. J., the instruction was held to be correct, and it was said: "Now, the question

arises whether the plaintiff's house in the case was 'injuriously affected,' . . . and whether there is damage sustained by the plaintiff," etc. Here it will be observed that the words "injuriously affected" are treated as synonymous with "damage," the word used in the constitution. Some states, notably Pennsylvania, have given provisions similar to that in our constitution a construction different from that given by this court. The language in section 8, article 16, of the constitution of Pennsylvania is, "shall make just compensation for property taken, injured, or destroyed."

In *Pennsylvania Railroad Co. v. Lippincott*, 116 Pa. St. 472, 2 Am. St. Rep. 618, it was held that a depreciation of property, by reason of the construction and operation of a railroad upon the lands of the company, was not an injury for which any damages could be recovered. But for the protection of individual rights, and as being more in harmony with the principles of the common law, we think the construction of this court and those of England better and more consonant with reason.

Under the decisions of this court, the questions for the jury to determine from the evidence were, whether the plaintiff suffered damages different in kind from those suffered by the general public, and whether the property of the plaintiff had been lessened in value by the acts of the defendant.

It cannot be said, under the evidence, that the verdict was excessive. It was midway between nothing, as fixed by defendant's witnesses, and three hundred dollars, the lowest estimate of witnesses for plaintiff. There having been no serious error in the admission of the testimony or charge by the court, the judgment should be affirmed.

HIGHWAYS — RIGHTS OF ABUTTING OWNERS. — As to the rights of abutting owners when the highway is used for any other purpose than that originally contemplated, see *Kincaid v. Indianapolis etc. Co.*, 124 Ind. 577; 19 Am. St. Rep. 113, and note; *Western Union Tel. Co. v. Williams*, 85 Va. 696; 19 Am. St. Rep. 903, and note.

STATE INSURANCE COMPANY OF DES MOINES v.
TAYLOR.

[14 COLORADO, 499.]

INSURANCE — APPLICATION — PLEADING. — The fact that a complaint on a policy of insurance, in setting forth the policy, annexes a copy of the application indorsed thereon, does not amount to an assertion that the application is correct, nor estop plaintiff from showing that it was written by defendant's agent, is not correct, and was not made, submitted to, nor signed by plaintiff.

INSURANCE — AGENT, WHO DEEMED ACTING FOR. — Agent for the purpose of soliciting insurance, sending application to the insurer, obtaining policies, and delivering them to the assured, and collecting premiums, is, in filling out and forwarding applications, the agent of the insurer, and if any error is committed or misstatement made by him, the assured should not suffer therefor.

INSURANCE. — **INSURANCE ON A FARM-HOUSE DESCRIBED AS THE RESIDENCE OF THE ASSURED,** is not avoided by the fact that the assured also kept an inn or public house, if the character of the house was not changed after the insurance was effected, and was then known to the agent of the insurer.

INSURANCE. — **INCREASE IN RISK RESULTING FROM ADJACENT PREMISES,** over which the assured has no control, will not avoid a policy of insurance, though it declares that if the "hazard is increased without the consent of the company in writing, the policy shall be void." This condition applies only to the insured premises, or to property under the control of the assured.

INSURANCE — DAMAGES. — When an insured building is destroyed, the damages recoverable on the policy are not limited to the amount for which the building could have been sold. The true measure of damages is indemnity to the assured, not exceeding the sum insured. In determining the amount of such indemnity, the cost of replacement is not the only criterion. The jury must take into consideration the age and condition of the building, and if by reason of age or use it is less valuable than a new building erected upon the same plan, of similar materials and of the same dimensions, the insurer should be allowed for the difference arising from deterioration.

ACTION on a policy of insurance on a farm-house used as a residence, and on its contents, including wearing apparel, family stores, and provisions. The policy stipulated "that application and survey No. 18,956, made by the assured, is hereby made a part of this policy, and a warranty on the part of this assured, and that this policy is issued upon the faith of the statement in said application and survey, as they thus appear in writing therein, only"; also, that any fraudulent statement in the application shall make this policy void, and "that in case of loss any attempt at false swearing or fraud of any kind shall be a forfeiture of all claims against the company on this policy," and that "this company re-

serves the right to rebuild and repair in case of loss." On the back of the policy was what purported to be an application for insurance by the assured, with his name attached, in which various statements were made regarding the premises insured. The insured premises were destroyed by fire, and within the time mentioned in the policy, and immediately after their destruction, the insurance company was notified of the loss, and furnished with requisite proofs of loss, and a demand was made on it for payment, which was refused. The complaint set out the policy of the insurance in full, and on the back of the copy of the policy a copy of the supposed application for insurance. The defendant, in its answer, relied upon the application for insurance as it appeared on the back of the policy, and claimed that the application was false and fraudulent in several particulars, specified in the answer. Verdict and judgment in favor of plaintiff; defendant appealed.

Stuart Brothers, for the appellant.

W. S. Decker and C. A. Allen, for the appellee.

REED, C. It is contended by appellant, in argument, that the appellee, by setting out in his complaint the application for insurance from the back of the policy, upon which his name appeared, indorsed it as his act, and made it a part of the contract sued upon, and was estopped from denying it. The pleader set out the policy of insurance as the basis of his action, and then says: "On the back of the policy is a copy of the application made for the insurance, in writing and print, as follows." It is neither indorsed as correct, nor adopted as or stated to be the application of the insured.

The appellant, in its amended answer, states that appellee made his application for a policy of insurance, in writing, setting forth the alleged application, and avers that material statements in the application were not true, and for that reason seeks to avoid liability for the loss. The appellee, in his replication, says he did not make or sign any written application, but that the one referred to was made by Van Arsdale, the agent of the company, without his knowledge or consent. There was no demurrer or motion filed to this reply, and the case proceeded to trial upon the issues made by the complaint, answer, and replication. By these pleadings, the responsibility for the written application was made a material issue in the case, and the court properly allowed appellee to testify that he did not make any written application, and also to give

his version of what actually took place between the parties in reference to the transaction. It is apparent from the evidence that the application for insurance upon which the policy was issued was incorrect in many important particulars, so far from being a true statement of the facts in regard to the insured property as to render a policy void if established by proof to be the act of the insured.

The first question to be determined from the evidence and the law applicable to the facts is, whether the application was that of the insured, or for which he was responsible, or the application and act of the insurer by its agent, for which it was responsible. That A. D. Van Arsdale was the agent of the appellant, to the extent of soliciting insurance, sending the applications for insurance to the company, obtaining policies, delivering them to the insured, and collecting the premiums, was established by his own evidence and that of J. A. Dubbs, the general agent for the state of Colorado. That in this instance he solicited the insurance is shown by the evidence of the appellee, and is undisputed. In regard to the application, there is no great conflict between the testimony of appellee and Van Arsdale. It plainly appears that no application was made out by appellee or in his presence, nor submitted to him, nor signed by him, and no authority given to the agent to sign his name; that the application was not seen by him, and that he was not informed of its character or contents; that the interview between him and the agent occurred late at night, in a saloon, without a blank form of application, and with no copy of the questions to be asked and answered. Van Arsdale says: "I asked questions, and took his answers, and put them down from memory, as nearly as I could, next morning." Appellee specifically denies the making of any of the important statements contained in the application relied upon to defeat a recovery; and in regard to several of them he is corroborated by Van Arsdale, and in no important point is he contradicted by him. Van Arsdale, in making up and forwarding the application, cannot be regarded as the agent of the insured, as supposed and contended by counsel for appellant. "Where an insurer intrusts applications in blank for insurance to a person, who forwards the same to the insurer, and is the medium through whom the insurer delivers the policy and receives the premium, the person so intrusted therewith is treated as clothed with the requisite authority to effectuate the duties confided to him, and to that extent rep-

resents the company, and can bind it. . . . The assured has a right to rely upon it that the agent has authority to explain the inquiries put in the application, and to determine what facts are required to be stated, as well as how they shall be stated, and acting upon his direction, if any error is committed, it is chargeable to the insurer, and not upon the assured; and if he fills out the application, and being correctly informed of the facts, misstates them, or omits to state them, the consequences are not to be visited upon the assured": Wood on Insurance, sec. 384; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465.

"When a person is in fact the agent of the insurer in procuring a policy, a clause in the policy, that persons so acting are agents of the insured, and not of the insurer, does not change the fact. He is still the agent of the company, as to the acts which are done in its behalf": May on Insurance, sec. 140.

In *Commercial Ins. Co. v. Ives*, 56 Ill. 402, the court, in commenting upon the effect of such a provision in the policy very pertinently says: "The words have no magic power residing in them capable to transmute the real into the unreal, nor had they power to make the agent of the company an agent of the insured": May on Insurance, sec. 140; *Union Insurance Co. v. Chipp*, 93 Ill. 96; *Eilenberger v. Protective M. F. Ins. Co.*, 89 Pa. St. 464.

"If at the time of the application the latter [the insured] states facts material to the risk, and the agent neglects to communicate them to the company, in consequence of which a policy is issued in ignorance of the fact, the neglect is not imputable to the applicant so as to make him responsible as for a concealment. That the agent is instructed to regard himself as the agent of the applicant, rather than of the company, these instructions not being known to the applicant, does not alter the case": May on Insurance, sec. 140; *Bebee v. Hartford etc. Ins. Co.*, 25 Conn. 51; 65 Am. Dec. 553.

Wilson v. Conway F. Ins. Co., 4 R. I. 141, was a case where the facts were very similar to those disclosed by the testimony in this case, where the agent sent an application he was not authorized by the applicant to send. He was held to be the agent of the company, so far as to estop it from denying the contract and from setting up its mistakes as misrepresentations as working a forfeiture. It was said: "He was at least the agent of the company for forwarding the application; and

his misconduct in that regard was imputable to his principal, and could not be allowed to prejudice the rights of the applicant, who did not know of it": See, further, May on Insurance, sec. 141; *Denny v. Conway etc. Ins. Co.*, 13 Gray, 492; *Ames v. New York Union Ins. Co.*, 14 N. Y. 258; *Malleable Iron Works v. Phoenix Insurance Co.*, 25 Conn. 465; *Woodbury Sav. Bank v. Charter Oak etc. Ins. Co.*, 31 Conn. 517.

In *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 291, 3 Am. Rep. 76, the question of agency, presented in this case, was ably discussed, and it was said: "The recent cases upon this subject fully sustain the position that upon this state of facts the company is responsible for the accuracy and omissions of its agent, even without any express undertaking to be so, and that it cannot avoid liability by reason of any discrepancy between the real facts as disclosed to him, and his presentation of them in the papers. The tendency of modern decisions has been strongly to hold these companies to that degree of responsibility for the acts of the local agents which they scatter through the country, that justice, and the due protection of the people demand, without regard to private restrictions upon their authority, or to cunning provisions inserted in policies with a view to elude just responsibility." See also *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83; *New England etc. Ins. Co. v. Schettler* 38 Ill. 166; *Eames v. Home Ins. Co.*, 94 U. S. 621.

Applying the law to the facts as proved, we must conclude that the employment of Van Arsdale by the appellant, in the capacity and for the purpose he was shown to have been employed, made him the agent for the company to the extent of receiving, making out, and forwarding to the company correct and proper applications for insurance, and that when, as in this instance, he entered upon the duty, and attempted to discharge it, any misstatements, errors, or omissions, the results of his own fraud, carelessness, or neglect, are to be deemed those of the insurer, and not those of the insured. Contracts of insurance, notwithstanding the intricate and complicated provisions contained in the policies, — perhaps found necessary to protect companies from fraud, — are to be considered and construed by the same rules of law and interpretation as other contracts, so as to carry out the intention of both parties, and hold each party responsible for his own wrong. Where there is on the part of the assured such intentional conceal-

ment, misrepresentation, or omission as amounts to fraudulent conduct on his part in procuring the insurance, it should vitiate and avoid the contract, and he should suffer the direct results of his own misconduct; but where, on the other hand, there is shown no fraudulent or wrongful representation or omission on the part of the assured, and the wrong is perpetrated through the fraud or negligence of the accredited agent of the insurer, it would be neither just nor equitable to hold the insured responsible for it.

In explaining our views in the present case, we can do far better by adopting and quoting from so eminent a jurist as Folger, J., than by any efforts of our own. In *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 63, 20 Am. Rep. 451, in a case presenting similar questions to the one under discussion, he said: "It is to be regretted that corporations of the power and extended business relations with all classes in the community which insurance companies have should prepare for illiterate and confiding men contracts so practically deceptive and nugatory, and should, in cases as free from fraud and wrong on the part of the insured as this is, hold their customers to the letter of an agreement so entered into. I am aware that often the companies are made the victims of dishonest and designing persons, but I cannot agree that the remedy for that is to refuse to be bound by the acts of agents of their own selection when dealing with simple and unlettered men. If there should be less greediness for business, and such care taken in the selection and appointment of agents as would insure the confidence of the companies in their capability, discretion, and integrity, it would not need that there be laid upon unwise policy holders an agreement to take the burden of the opposite qualities in those put forward to them as actors for the insurers."

Under the evidence, it must be held that the application which was forwarded was the act of the agent, and consequently the act of the insurer, for which it alone was responsible, and that the company is estopped to set up any statements contained in the application to defeat a recovery. To hold otherwise would be to place every simple or uneducated person seeking insurance at the mercy of the insurer, who could, through its agent, insert in every application, unknown to the applicant, and over his signature, some false statement which would enable it to avoid all liability, while retaining the price paid for supposed insurance. Courts, while

careful not to discriminate against insurance companies, should give to their contracts such interpretation, and to the acts of their agents such construction, as to afford some security to those with whom they contract.

It is contended that the policy was avoided by the assured keeping an inn or boarding-house. It does not appear from the evidence that the character of the house in that particular was changed after the insurance was effected. It appears from the evidence of the appellee that the agent was informed that persons were entertained at the place, more or less, owing to want of other places of entertainment, and that some boarders were kept at times. This is admitted by the agent, Van Arsdale, who says he communicated the fact to the general agent. Both the special and the general agents having been informed that parties were kept, and it not having been shown that such business was more extensively done after than before insurance, or that the loss by fire was in any way caused by people having been entertained, it should not be considered of sufficient importance to reverse the judgment.

It is also urged that the occupancy of the adjoining log house as a store, carrying in stock kerosene and giant powder, greatly increased the risk, and that the failure of appellee to notify the company worked a forfeiture of the policy. It is not claimed that appellee owned or exercised any control over the building, or that the statement that the building was vacant at the time of the insurance was untrue. The proof shows it to have been occupied only two months before the fire occurred. It is provided in the policy that if the "hazard is increased without the consent of the company in writing," the policy shall be void. This should be construed as only applying to the insured premises, or to property under the control of the insured. There is nothing in the language used which would extend it to the property not under his control, and the acts of others, and hold him responsible for the acts of his neighbors or of contiguous owners, and require him to keep informed as to the manner in which other persons in the neighborhood used their property, or to communicate the facts to the insurer. The contract of insurance being mutual, good faith should require that he give information of any fact or act of his own, or with his consent, on property insured or adjoining, and under his control, whereby the risk was increased. Further than that he could not be expected to go. The statement that at the time of the application the building was vacant must be

regarded only as a statement of its condition at that time, not a warranty that it should remain so. He, not being the owner, could not be presumed to have intended to take possession and control of the property: May on Insurance, secs. 244, 247; Wood on Insurance, sec. 237.

In this case it is shown that the use of the log building, owned by a third party, in no way contributed to the destruction of the insured property, or the loss; that the fire originated in the roof of the insured building, extended to and consumed the log building, but not until the goods, including oil and giant powder, had been removed.

The only remaining question is as to the rule of damages in arriving at the value of the building destroyed. It is contended that the amount allowed was excessive; that the true value was what the property would have sold for in the market. Counsel do not say whether, in fixing the value, the house is to be considered a chattel, and its value what it would bring severed from the realty, or whether its value was to be estimated in connection with the land on which it stood. The rule contended for cannot be the correct one. If so,—if there was no market demand for the property so it could be sold,—it would have no value, and there would be, consequently, no loss. Another trouble is, as above suggested, it would make the value of the house insured to depend upon the marketability of the uninsured land. A farmer might have an insured building of the value of five thousand dollars on a large farm, and yet be held to have sustained no loss by its destruction because there was no demand for land in that location, and the farm could not have been sold. While the price for which the property could be sold might be admissible in evidence to assist in arriving at its value, it was not the only nor a safe criterion. If not salable at all, it might have a value to the owner as a home for himself and family, or for business purposes. Where, as in this case, the policy was “valued” (amount of insurance fixed), the rule is indemnification to the owner not exceeding the sum insured; the question, not what some one would have paid for the building, but what amount would indemnify the owner for the loss sustained.

The rule of damages is the value of the property lost, and not the cost of replacement: *Steward v. Phoenix F. Ins. Co.*, 5 Hun, 261. It is for the jury to determine how much money will make good to the insured his loss: *Brinley v. National Ins. Co.*, 11 Met. 195. “It is for the jury to say what the actual value

of the building was, in view of all the facts, and their finding is conclusive": Wood on Insurance, sec. 446.

Counsel seem to have confounded the measure or rule of damage for merchandise or goods destroyed with that for buildings. In the former, the value in market is correct. In the latter, it must be "the actual value of the property in the condition it was in at the time of loss, taking into consideration its age and condition, and not necessarily what it would cost to erect a new building. The assured should be allowed the value of his building at the time of loss; and if, by reason of age or use, it is less valuable than a new building erected upon the same plan, of similar materials and of the same dimensions, the insured should be allowed for such difference arising from deterioration": Wood on Insurance, sec. 446; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 205; 78 Am. Dec. 418.

It follows that the original cost of the building, the cost of constructing a like building at the time of trial, on the same land, and the difference in value between the building destroyed, by reason of its age and use, and a new one, were all proper inquiries to assist the court in arriving at a just conclusion in regard to the loss sustained; and the admission of evidence upon these points was not erroneous, as supposed by appellant. In our view of the case, no serious errors occurred upon the trial, and the judgment should be affirmed.

INSURANCE — AGENCY. — Who is deemed to be an insurance agent: See *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 533; 15 Am. St. Rep. 696; *Continental Ins. Co. v. Pearce*, 39 Kan. 396; 7 Am. St. Rep. 557.

INSURANCE — EFFECT OF FRAUD OR MISTAKE OF THE AGENT. — The fraud, misrepresentations, misstatements, or mistakes of the company's agent do not prejudice the assured in his right to recover upon a contract of insurance to which he innocently became a party: *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 533; 15 Am. St. Rep. 696, and note; *Baker v. Ohio etc. Ins. Co.*, 70 Mich. 199; 14 Am. St. Rep. 485, and note; *Deitz v. Insurance Co.*, 31 W. Va. 851; 13 Am. St. Rep. 909, and note; *Western Assur. Co. v. Stoddard*, 88 Ala. 607; *Germania Ins. Co. v. Hick*, 125 Ill. 351; 8 Am. St. Rep. 384; *Phenix Ins. Co. v. Golden*, 121 Ind. 524; *German Ins. Co. v. Gray*, 43 Kan. 497; 19 Am. St. Rep. 150; *Russell v. Detroit etc. Ins. Co.*, 80 Mich. 407.

INSURANCE POLICY, ACTION ON — AMOUNT OF RECOVERY: See *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 205; 78 Am. Dec. 418; *Reilly v. Franklin Ins. Co.*, 43 Wis. 449; 28 Am. Rep. 552. In the case of *Chippewa L. Co. v. Phenix Ins. Co.*, 80 Mich. 116, where the policy provided that in case of a loss of the lumber insured the damages in no case should exceed the actual cost of producing the lumber, it was decided that if the assured had purchased the logs themselves, he might recover their price, with interest from the time of purchase, as well as the cost of manufacturing and storing; but if he merely purchased the stumpage, recovery on the policy should be limited to the price paid for stumpage, with interest and costs.

WILSON v. HAWTHORNE.

[14 COLORADO, 530.]

JUDGMENT — WANT OF JURISDICTION. — AN ACTION ON A JUDGMENT may be defeated by showing, under proper averments, by way of cross-complaint, and in opposition to the recitals of the record, that process was not served on the defendant, and that he did not appear in the action.

JUDGMENT, RELIEF FROM, IN EQUITY. — To entitle a party to relief in equity from a judgment entered against him without jurisdiction over his person, he should allege that he had a good defense to the action on the merits. This allegation is regarded as a guaranty of his good faith, but it is not traversable, because defendant, as a result of a judgment so obtained, is not compelled to assume the burden of proof by affirmatively establishing, by a preponderance of evidence, the non-existence of the facts necessary to support plaintiff's recovery.

JOINT JUDGMENT, RELIEF FROM — PLEADING. — Where two defendants are sued upon a joint judgment against them, and jointly plead, by way of cross-complaint, that one of them was not served with process, and did not appear in the action, such pleading is sufficient as to the defendant alleged not to have been served, whether it shows a sufficient defense for the other or not.

W. T. Hughes, for the appellants.

ELLIOTT, J. From the abstract of record in this case it appears that the action was begun by appellee, as plaintiff, in the county court, in 1885, to recover the balance due upon a certain other judgment, rendered in his favor in the same court, in 1878. To the complaint appellants, as defendants, filed an answer containing certain denials, and also a further equitable defense or cross-complaint verified.

The cross-complaint is in the nature of a bill in equity to impeach a judgment for want of jurisdiction. Its allegations are affirmative, both in form and substance. They are to the effect that the judgment sued upon was rendered by the county court of Clear Creek County upon an appeal from a justice's court; that no summons was served upon Henry Wilson from the justice's court; that he did not appear in that court, did not unite in the appeal to the county court, and never appeared in the action, either in person or by attorney; and further, that the entry of the appearance of Henry Wilson by the county court was unauthorized; that Henry Wilson was not served with process, and did not appear in person in the case at any time; that the attorney for David R. Wilson was without authority to appear for Henry, and in fact appeared for David R. alone, so that the judgment of the county court was void for want of jurisdiction; and that the county court, though

duly requested, in apt time, by motion supported by affidavits, to amend the record so as to show that said Henry Wilson was not subject to its jurisdiction, refused so to do. Upon these and other pertinent and amendatory allegations added by leave of the court, excusing delay in not sooner seeking relief from the judgments sued upon, defendants demanded "that the said judgment be vacated and annulled, and that the plaintiff be enjoined from further proceedings thereon."

From the abstract of the record before us it further appears that a demurrer upon general grounds, and also upon the ground that the matters set forth in the cross-complaint were barred by the statute of limitations, was interposed, and sustained by the county court; that thereupon an appeal was taken to the district court of Clear Creek County, in which court the demurrer to the cross-complaint was overruled, and leave and ample time were given to plaintiff to answer the same. After these recitals the abstract of record contains the following statement: "December 23, 1886, no answer to the cross-complaint having been filed, the cause came on for trial upon the allegations of the cross-complaint and its amendments. After hearing the evidence, consisting of record exemplifications, the court adjudged the cross-complaint and its amendments insufficient, and dismissed the same."

The defendants bring this appeal. No part of the evidence or of the record exemplifications appear in the abstract of record. The only error assigned is, that "the court erred in dismissing the cross-complaint and refusing the relief prayed for."

This appeal is governed by the act of 1885: Sess. Laws, 350. Section 16 of said act provides that "the cause shall be submitted to the supreme court upon the printed abstract of record and amended abstracts, as hereinafter provided, and no transcript of record in writing shall be filed, and no costs shall be taxed therefor except as herein provided." In construing this section of the statute, this court, in the case of *South Boulder Ditch and Reservoir Co. v. Community Ditch and Reservoir Co.*, 8 Col. 429, said: "The review of the case is had upon the printed abstracts." The same rule was announced in *Halsey v. Darling*, 13 Col. 1.

By overruling the demurrer, the district court adjudged the equitable defense or cross-complaint sufficient in law to bar the plaintiff of his action, at least as to one of the defendants. The plaintiff having failed to answer or reply to the cross-

complaint, every material allegation thereof must, "for the purposes of this action, be taken as true." This rule of pleading is expressly declared by the Code of Civil Procedure of this state, and is sustained by the general current of authority: Col. Code, sec. 71; Pomeroy's Remedies, sec. 617; *Crater v. McCormick*, 4. Col. 196; *Tucker v Parks*, 7 Col. 62; *Silvey v. Neary*, 59 Cal. 97; *Fergus v. Tinkham*, 38 Ill. 407.

It follows from the foregoing that, unless there was fatal error in overruling the demurrer to the cross-complaint, — that is, unless said cross-complaint is wholly insufficient, both in form and substance, for any purpose whatever, — the action of the court in dismissing the same for insufficiency as to both defendants cannot be sustained. It becomes necessary, therefore, to consider whether the equitable defense or cross-complaint as pleaded is fatally defective, or whether it is sufficient in substance as an answer to the plaintiff's action upon the original judgment, either in whole or in part. Though the authorities are somewhat conflicting upon questions of this kind, we think that the better doctrine is, that a judgment rendered without obtaining jurisdiction of the person may be impeached and set aside by a proceeding in equity for that purpose; that in such proceeding the recitals of the record will not be taken to import absolute verity; and also that an action brought upon a judgment pronounced without obtaining jurisdiction of the person of the defendant may be defeated by a proper answer, under a system of procedure allowing equitable defenses to be interposed in all civil actions. To warrant such relief, the contradiction of the record must be clearly established; but we need not discuss the kind or *quantum* of evidence required, since, in this case, no issue was taken on the cross-complaint: Col. Code, secs. 59, 60; Bliss on Code Pleading, sec. 347; Freeman on Judgments, sec. 495; *Marr v. Wetzel*, 3 Col. 2; *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204; *Thompson v. Whitman*, 18 Wall. 457; *Ridgeway v. Bank of Tenn.*, 11 Humph. 523.

In determining whether or not the cross-complaint as pleaded is sufficient, it becomes necessary, also, to consider whether a judgment rendered without due process of law, and without jurisdiction over the person, may be relieved against without any showing of merits by the party seeking such relief. Here, again, the authorities are in conflict. The cross-complaint in this action contains no allegation that the defendant Henry Wilson was not liable in the original action equally with the

defendant David R. Had the demurrer been specially interposed and sustained for the want of such averment, the ruling would not have been erroneous. The jurisdiction of equity should not be invoked except by a complaint alleging that real injustice has been or is likely to be done. But we are not prepared to say that such averment is essential or traversable. The showing of merits should not be required to the extent of compelling a party against whom a judgment has been obtained, without jurisdiction over his person, to come into a court of equity and assume the burden of disproving his liability. On the contrary, a party thus circumstanced is entitled to the maintenance of his right to defend against such supposed liability in an action wherein his adversary must assume the burden of proof. This distinction is important in all cases, and in many may be absolutely controlling.

The allegation of merits, though not traversable, may very properly be required as an earnest of good faith from the party seeking relief from a supposed unauthorized judgment; and as a rule, under our system, such pleading may be required to be verified. If a pleading be demurred to for want of such averment, it may be dismissed, unless amended; but in this case the absence of the averment, not having been made a ground of demurrer, did not justify the dismissal of the cross-complaint: *Freeman on Judgments*, sec. 498; *Bell v. Williams*, 1 Head, 229; *Ryan v. Boyd*, 33 Ark. 778; *Crawford v. White*, 17 Iowa, 560.

In view of a retrial of this action, it is desirable that it should be now determined whether or not the equitable defense or cross-complaint can be made available in favor of the defendant David R. Wilson, as well as the defendant Henry. The authorities are divided upon questions of this character. It has been frequently asserted that a judgment is an entirety, and if void against one defendant, is void against all. On the other hand, it has been held that a judgment rendered against several parties, part of whom were not subject to the jurisdiction of the court, may nevertheless be maintained against those over whom jurisdiction was regularly obtained. But in cases of the latter class the validity of the judgment seems to depend upon the circumstances of the particular case, such as the form of the judgment, the consideration upon which it was founded, the relation of the parties defendant to each other, statutory provisions, the mode in which relief is sought, and the like: See case of *St. John v. Holmes*,

32 Am. Dec. 603, together with note and cases appended thereto.

From the abstract of the record before us, it does not appear that the original judgment was in any manner challenged upon this particular ground; and the abstract is not sufficiently specific to enable us to determine the question with safety, so we shall not express an opinion upon the matter. But in this connection it is proper to observe that if it should be determined on a retrial that the matters contained in the equitable defense are sufficient as to Henry Wilson, but not as to David R., the fact that Henry pleaded the defense jointly with David, instead of pleading separately, will not defeat Henry's right to protection against the original judgment. The rigid rule in common-law actions announced in *Deutsch v. Wiggins*, 1 Col. 299, that a joint plea, insufficient as to one defendant, is insufficient as to all, is not properly applicable to an answer in chancery, or to an equitable defense of this kind, under the liberal provisions of our Code of Procedure, especially after a demurrer, not interposed upon such ground, has been overruled, and the privilege of amendment passed by: Col. Code, secs. 59, 70, 77, 443; Story's Eq. Pl., secs. 443, 692; *Huggins v. Building Co.*, 2 Atk. 44.

The plaintiff not having made answer or reply to the cross-complaint, his action should have been dismissed, at least as to the defendant Henry Wilson, unless said defendant desired to have the case heard for the purpose of obtaining the affirmative relief sought by the cross-complaint.

The judgment of the district court is reversed, and the cause remanded.

JUDGMENT — WANT OF JURISDICTION FOR LACK OF SERVICE OF PROCESS.

— An action may be brought in equity to cancel a judgment which is void for want of service of process, and the action to set aside and cancel need not necessarily be brought in the same court which rendered the judgment: *State Ins. Co. v. Waterhouse*, 78 Iowa, 674; *Bender v. Damon*, 72 Tex. 92. Defendant seeking to relieve himself in equity from such a judgment must have a meritorious defense: *State v. Hill*, 50 Ark. 458; but it is not necessary for defendant to show that he has a meritorious defense to the judgment alleged to be void, where the legal and equitable jurisdictions are united in the same court, and the action to set aside the judgment is prosecuted in the same court in which it was rendered: *Magin v. Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216, and note discussing the question of setting aside judgments rendered by a court having no jurisdiction, on account of a want of service of process. Compare *Lang Syne Gold Mining Co. v. Ross*, 20 Nev. 127; 19 Am. St. Rep. 337.

A judgment, not void upon its face, containing recitals as to due service of process, cannot be set aside for want of service of process, years after its rendition, merely upon a motion to vacate: *People v. Blake*, 84 Cal. 611; *People v. Harrison*, 84 Cal. 607; *People v. Goodhue*, 80 Cal. 199; although a judgment entered without service of process on defendant may be set aside on a motion timely made in the court in which it was rendered; *Bradley v. Welch*, 100 Mo. 259.

STEVENSON v. PALMER.

[14 COLORADO, 565.]

ATTACHMENT OR EXECUTION, PROPERTY NOT SUBJECT TO. — THE GIVING OF A DELIVERY BOND, after the levy of a writ of attachment wherein the sureties undertake, in the event of the plaintiff's recovering judgment, to deliver the property to the officer who levied the writ, or on failure to do so, to pay the value thereof, not exceeding the amount of the judgment, does not release the lien of the attachment, nor render the property subject to seizure under other writs while in the hands of the defendant in attachment.

ATTACHMENT AND EXECUTION. — SURETIES ON A DELIVERY BOND under which attached property has been, by the officer levying the writ, surrendered to the defendant, have no right to the possession thereof before the entry of final judgment in the action, and hence cannot maintain an action of replevin against an officer who subsequently seizes the property under another writ.

ATTACHMENT AND EXECUTION. — If, after attached property is surrendered to the defendant in pursuance of a delivery bond, it is seized and taken from his possession under another writ, whereupon he executes, with sureties, another delivery bond, and again gains possession of the property, and upon judgment being recovered against him in the second action, surrenders possession of the property to an officer, pursuant to the terms of the second bond, he cannot maintain an action against the second officer for the possession of the property, though the second levy, by reason of the first, was unauthorized.

W. J. Weeber, for the appellant.

P. L. Palmer, for the appellees.

HAYT, J. The statute under which the redelivery bonds were both given reads as follows: "The defendant may, at any time before final judgment in the action, release all property which may have been seized by virtue of the attachment writ, by his executing an undertaking as hereinafter provided. Such undertaking shall be given by the defendant to the plaintiff, be signed by two responsible sureties, each a resident of the county in which the suit is pending, and shall be to the effect that in case the plaintiff recover judgment against the defendant in the action, and the attachment is not dissolved, the defendant will deliver to the constable all property which

has been seized by him by virtue of the attachment writ, or on failure so to do, will pay to the plaintiff the full value of the property attached, not exceeding the amount of the judgment and costs recovered in the action": Gen. Stats. 1883, sec. 2015.

In case of levy of the writ of attachment, unless a redelivery bond be given, the officer must retain the custody of the property awaiting the result of the attachment proceedings. This is essential, in order that the property may be under the control of the court to answer any demand which may be established against the defendant by the final judgment in the case. If the bond be given, the responsibility of the obligors is substituted for that of the officer for the property attached, the principal object of the bond being to insure the safe-keeping and faithful return of the property attached to the constable, although, in the alternative, the obligors may discharge themselves from their obligation by paying the full value of the property, not exceeding the amount of the judgment and costs in the action. Were it not for this alternative provision, there could be no question as to the continuance of the lien, although the bond be given. The sole condition would then be, that the property shall be returned to the constable if plaintiff recover judgment and the attachment be not dissolved. To hold that the property would be liable to execution under such circumstances would be to allow third parties to produce a forfeiture of the conditions of the bond; for a levy would make the performance of the conditions of the bond impossible. And the courts and law-writers unite in saying that the property is not so liable: Drake on Attachment, sec. 331; Wade on Attachment, sec. 193; Waples on Attachment, 396, 397; *Tyler v. Safford*, 24 Kan. 580; *Roberts v. Dunn*, 71 Ill. 46; *Hagan v. Lucas*, 10 Pet. 401.

"The sheriff, by intrusting the property to the defendant under such bond, does not lose his legal possession of it. The defendant holds under the sheriff, so that the *res* is still in the constructive possession of the court. The ancillary proceeding in the suit does not abate by virtue of the forthcoming bond, which would inevitably be the case were the court to lose its custody and jurisdiction of the property, and the defendant to regain unqualified possession of it": Waples on Attachment, 397.

But where, as with us, the statute provides that the bond is to be given to the plaintiff, and conditioned that the property shall be returned to the officer, or its value paid to the plain-

tiff, it must be admitted that the authorities are so conflicting as to create some doubt as to the law on the subject. Upon this question Mr. Waples gives it as his opinion that property thus released may be sold by the defendant, subjected to new attachments by other creditors, or levied upon in execution, in like manner as though the attachment had been dissolved: Waples on Attachment, 401, 402. The author cites several Iowa cases, which undoubtedly support the text: See *Jones v. Peasley*, 3 G. Greene, 52; *Austin v. Burgett*, 10 Iowa, 302; *Woodward v. Adams*, 9 Iowa, 474.

Drake, in his work on attachment, contents himself with quoting, in a foot-note, the doctrine of the leading Iowa case without comment: Drake on Attachment, 266. In the treatise of Mr. Wade, in the section previously referred to, the author, in speaking of forthcoming bonds, says: "In some of the states the bonds are conditioned in the alternative, for the delivery of the chattels, or for the payment of their value or the amount of the judgment. But the alternative condition does not discharge the property from the lien." In support of this opinion the author cites two cases: *Gray v. Perkins*, 12 Smedes & M. 622; *Gass v. Williams*, 46 Ind. 253.

The section under consideration by the court in the Mississippi case provided, in substance, that attachments shall hereafter be repleviable, at any time before final judgment, on the appearance of such defendant, and his execution of a bond, with sufficient security, payable to the plaintiff, in a sum double the value of the property attached, and conditioned to have said property forthcoming to abide the order or decree of the court to which said writ of attachment shall be returnable, or in default thereof, to pay and satisfy, to an extent not exceeding the value of said property, such order or decree of said court. And the court held that by the very terms of the condition, "to have said property forthcoming to abide the order or decree of the court," an intention to preserve the lien was manifest.

So, also, in the case of *Gass v. Williams*, 46 Ind. 253, under a statute authorizing the property to be released upon the giving of a delivery bond conditioned for its return, or, in the alternative, for the payment of its value, not exceeding the amount of the judgment and costs, the court held that the giving of a bond did not discharge the lien of the attachment, but that the custody of the defendant was thereby substituted for that of the officer, and that the property was as far from

the reach of processes as it would have been in the officer's hands.

Without the alternative provision of the statute, the measure of the liability of the defendant and sureties upon the bond in case the property is not redelivered, as required by the terms of the bond, is the value of the property attached, provided the value does not exceed the amount of the judgment and costs: Waples on Attachment, 396, 397; Drake on Attachment, sec. 342.

And such is the exact liability fixed by the terms of the act. It will be seen, therefore, that the alternative provision of the statute is but a legislative indorsement of a rule of decision previously announced by the courts. Certainly, therefore, every reason for holding that without this provision the lien is not discharged by the giving of a redelivery bond is an argument in favor of the conclusion that under such a provision the lien remains although the bond be given. The primary condition of the bond in either case is, that the defendant will, on demand, redeliver the property, the liability of the sureties for the value attaching only upon his failure so to do.

The purpose of having the property redelivered is, that it may be subjected to the payment of the judgment; and we think it would be a fraud upon the sureties to allow it to be subjected to execution issued at the suit of other parties, and thus permit third parties to defeat a compliance with that which we have seen is the primary condition of the bond.

In suits in the justice's court there is no provision of law for prorating the proceeds of the attached property, the creditor first securing a lien upon the property by attachment being entitled to sufficient of the proceeds thereof to discharge his judgment; and we think the better reason, and perhaps the weight of authority, are in support of the doctrine that the attachment lien is not discharged by giving a redelivery bond, as in this case, conditioned for the return of the property, or, in the alternative, the payment of its value.

Having determined that the lien of the attachment issued at the suit of Whitsett remained in force at the time of the levy of the execution issued in the suit, we are next to consider whether such lien entitles these plaintiffs to maintain the action of replevin against the officer for the possession of the chattels covered by the redelivery bond.

The sureties upon the forthcoming bond do not claim to

have any interest in the property other than the right to have it preserved so that it may be delivered upon the bond in case such delivery be required. At the time this case was tried in the court below, the suit in which the first forthcoming bond was given was still pending and undetermined. The sureties upon such bond had not, therefore, become liable for one dollar upon their obligation. The defendant may finally obtain judgment in his favor in that suit, or the attachment may be dissolved; and in either event, the sureties upon the bond would be discharged from all liability. The defendant alone became entitled to the possession of the property upon the giving of the bond. Such right of possession did not extend to his sureties; and they could not, therefore, maintain this action for a return of the property: *Wells on Replevin*, secs. 154 et seq.; *Gray v. Perkins*, 12 Sineses & M. 622; *Hagan v. Lucas*, 10 Pet. 401; *Lusk v. Ramsay*, 3 Munf. 417.

Neither is Frank F. Noxon, the defendant in the attachment suits, entitled to recover, under the evidence, it appearing that when the second attachment writ was levied upon this property, Noxon gave a second forthcoming bond, which he signed with Palmer and another as sureties thereon, conditioned that in case the plaintiff recover judgment against the defendant in that action, and the attachment be not dissolved, the defendant will deliver to the constable the property, or on failure, pay its value. Thereafter the attachment was sustained, and judgment entered against the defendant Frank F. Noxon. By the terms of this bond, the officer then became entitled to the possession of the property, and it was accordingly surrendered to him by Noxon. Under these circumstances neither the defendant nor the sureties upon this second bond are entitled to the possession of the property as against the officer, although he holds it subject to the lien of the first attachment: *Case v. Steele*, 34 Kan. 90; *Pierce v. Whiting*, 63 Cal. 538; *Dorr v. Clark*, 7 Mich. 310; *Leeper v. Hersman*, 58 Ill. 218; *Lusk v. Ramsay*, 3 Munf. 417.

No question as to the right of the sureties, whose names appear upon the first bond only, in a proper action to compel the officer to respect the lien of the first attachment, is presented upon this record. We think it clear that the action of replevin cannot be maintained against him, and further than this we do not feel at liberty to decide.

The judgment will be reversed, and the cause remanded, with directions to the court below to dismiss the action.

ATTACHMENT, WHAT PROPERTY NOT SUBJECT TO. — Property attached and left in charge of a receiptor, without removing it or giving notice of the attachment to any one in the vicinity, is not subject to attachment under a subsequent writ: *Hemmenway v. Wheeler*, 14 Pick. 408; 25 Am. Dec. 411; nor can the officer retake it under the same writ without the consent of the receiptor or owner: *Weston v. Dorr*, 25 Me. 176; 43 Am. Dec. 259. So goods levied upon and left in the hands of the judgment debtor, in behalf of the officer making the levy, cannot be seized by another officer under another writ: *Brewster v. Vail*, 1 Spencer, 56; 38 Am. Dec. 547.

Personalty *in custodia legis* is not subject to attachment: Note to *Hardy v. Tilton*, 28 Am. Rep. 35, 36; and the taking of a forthcoming bond for the delivery of personal property at the day of sale does not release such property from the custody of the law: *Lantz v. Werthington*, 4 Pa. St. 153; 45 Am. Dec. 682, and note.

CASES

IN THE

SUPREME COURT

OF

GEORGIA.

HOBBY v. BUNCH. BUNCH v. HOBBY.

[83 GEORGIA, 1.]

EJECTMENT. — IF THERE IS NO DEMISE in a declaration in ejectment from a particular person, no recovery can be had based upon his title.

EJECTMENT. — DEMISE FROM A SHERIFF CANNOT support a recovery, for that officer does not acquire any title by his levying a writ upon the lands of another person.

EJECTMENT. — DEMISE TO A PARTICULAR PERSON WILL NOT SUPPORT A JUDGMENT IN EJECTMENT IF HE CONVEYED his title to the defendant before the action was brought.

CONVEYANCE TO A WIDOW AND HER CHILDREN, without naming them, vests the title in her and her children then in being as tenants in common.

EJECTMENT — AMENDMENT CHANGING NATURE OF ACTION. — Plaintiff will not be allowed to amend his declaration so as to enable him, instead of recovering the land sued for, to have judgment for the amount paid out by him as purchaser at a foreclosure sale thereof, and for the sale of the land to repay such amount.

JUDGMENT RECITING SERVICE OF PROCESS, but not stating the mode of service, when there is a return upon such process, must be considered as referring to such return, and if the service there shown is insufficient, the judgment is void. Hence, though a judgment declares that a defendant has been served with a copy of a rule, and the sheriff's return shows service of the rule upon the defendant by leaving a copy thereof at her residence, no other service will be presumed than that stated in the return; and that being insufficient, the judgment will be held void.

IN FORECLOSURE PROCEEDINGS, DUE SERVICE OF PROCESS IS NO LESS REQUIRED to give a court jurisdiction of the person and subject-matter than in ordinary personal actions.

JUDGMENT, WHEN VOID. — If the defendant neither appears nor is served with process, the judgment against him is void.

JUDGMENT PROCESS, SERVICE OF, WHEN INOPERATIVE. — When process is required to be personally served, a service by leaving a copy at the defendant's residence is no service at all.

THE RETURN OF PROCESS IS A PART OF THE RECORD, and must be noticed even by a purchaser, though the judgment recites service thereof.

JUDGMENT IS CONCLUSIVE ON ALL DEFENSES which could have been presented by the exercise of due diligence. Therefore a judgment cannot be collaterally avoided by showing that it was based on a note which might have been resisted by proving that it was given in consideration of an illegal sale of fertilizers.

EJECTMENT against Ike Jackson, in which Mrs. Mary A. Bunch and her children were, at their request, made defendants at the appearance term. The declaration counted on a demise from Wensley Hobby, trustee, and Bradford Ivy, sheriff. All parties claimed under Wensley Hobby, trustee, who conveyed the property, June 24, 1881, to "Mary A. Bunch and her children," in consideration of \$700, then paid, and two promissory notes, executed by her, and secured by mortgage on the same premises, for \$150 each. Execution on a judgment in favor of Barrett and Caswell, and against Mrs. Bunch, levied October 3, 1883, was followed by a sale thereunder to T. D. Caswell November 6, 1883, and by a conveyance pursuant to such sale recorded November 13, 1883, and ratified and confirmed on October 30, 1884. Proceedings were taken to foreclose the purchase-money mortgage given by Mrs. Bunch, resulting also in a sale of the property to Caswell May 6, 1884, and a subsequent conveyance to him, dated the day of the sale, and ratified and confirmed by the sheriff October 30, 1884. In these foreclosure proceedings were certain jurisdictional defects, fully disclosed in the opinion of the court. Before the commencement of the action, T. D. Caswell died, and William H. Warren became his administrator. Plaintiff announced that he did not rely upon the deed of November 6, 1883, against any of the defendants except Mrs. Bunch. He also moved to amend his declaration so as to entitle him to a verdict for the amount paid at the foreclosure sale, and to a decree of sale therefor. The defendants offered in evidence the record in the action brought by Barrett and Caswell, for the purpose of showing that the judgment was recovered on a note given for "oriental fertilizer," and that it was unlawful and void by reason of certain waivers contained therein, which were claimed to be forbidden by the laws of the state. On motion of the plaintiff, the record was excluded, and the defendants excepted. Verdict in favor of the plaintiff for one eighth of the premises, and in favor of the defendants, other than Mrs. Bunch, for the residue. Both parties, being dissatisfied, excepted.

F. H. Miller and W. K. Miller, for the plaintiff.

Salem Dutcher, for the defendants.

BLECKLEY, C. J. 1. As there was no demise in the declaration from Caswell, his heirs or administrator, there could be no recovery by the plaintiff below on his title; therefore all contest over his purchase at either of the sheriff's sales was irrelevant and nugatory. Showing title in Caswell would not tend to support the action, but would be the certain defeat of it, since it would negative the right of all other persons, save his heirs or legal representatives, to demise the premises to John Doe.

2. It surely cannot be necessary to enter into any course of reasoning, or cite authority, to establish the proposition that no recovery can be had in ejectment on a demise from the sheriff who has seized land and sold it by virtue of judgments and writs of *fiery facias* against another person. The sheriff acquires no title to land by levying upon it; and there is no evidence in the record that this sheriff ever acquired or had title otherwise. But suppose he obtained title by levying upon the land; he sold twice and made two deeds to Caswell, and both these deeds were introduced in evidence by the plaintiff. After this, how could it be imagined that a recovery could be had upon a demise from the sheriff?

3. There could be no recovery on the demise from Hobby, trustee, because the deed from him to Mrs. Bunch and her children passed title out of him, whether Mrs. Bunch alone acquired it, or whether it passed to her and her children jointly as tenants in common. We think, however, as her children were in being at the time the deed was executed, that she took only an undivided share, and that each of them took one share also: *Ewing v. Shropshire*, 80 Ga. 374. So far, therefore, from failing to recover as much land as the plaintiff was entitled to, the recovery, being for one eighth of the premises, was more than the state of the pleadings and the evidence under them warranted. In strict law, nothing whatever was recoverable upon any demise or all the demises in the declaration.

4. The refusal of the court to allow the proposed equitable matter to be ingrafted upon the action of ejectment by amendment is conclusively justified by the state of the pleadings as they stood when the amendment was offered. The proposed amendment was entirely too remote from the original cause

of action and the parties thereto to be germane to the controversy set out in the declaration. If the administrator of Caswell has any right to recover from the Bunches money paid by his intestate for their benefit, but not at their request, or to be subrogated to the rights of Hobby as plaintiff in *fiere facias*, let him bring a direct action therefor, and not present this claim as a mere weld on an action of ejectment brought to recover the land upon demises from other persons to John Doe. We think the two causes of action are wholly separate and distinct, not only as to subject-matter, but as to the parties mentioned in the pleadings.

5. What we have said is quite sufficient to dispose of the bill of exceptions brought by the plaintiff; but as another question of considerable interest was argued, and as we have investigated it laboriously and somewhat thoroughly, we will express our opinion upon it. That question is, whether the judgment foreclosing the mortgage made by Mrs. Bunch to Hobby, trustee, was or was not void as against Caswell, who purchased the property at a sheriff's sale made under and by virtue of an execution founded on the judgment. The judgment of foreclosure recites service of the rule *nisi* in these terms: "And it appearing that a copy of said rule *nisi* has been served on said defendant three months before the term of this court, and that said defendant has shown no cause to the contrary, and still neglects and refuses to pay the amount due on said mortgage, it is therefore adjudged by the court that the equity of redemption in and to said mortgaged premises be and the same is hereby barred and forever foreclosed. And it is further ordered and adjudged that said plaintiff do recover," etc.

The sheriff's return of service, upon the rule *nisi* to foreclose the mortgage, is in these words: —

"Served a copy of the within rule, etc., upon the defendant Mrs. M. A. Bunch, by leaving same at her residence, December 21, 1883.
E. J. Ivy, D. Sheriff."

Judgment was rendered March 25, 1884, and the sheriff's return is a part of the record of the proceeding to foreclose which resulted in the judgment. The statute regulating the foreclosure of mortgages upon realty (Code, sec. 3962) provides that the rule "shall be published once a month for four months, or served upon the mortgagor, or his special agent or attorney, at least three months previous to the time at which the money is directed to be paid into court." Only the sheriff

or his deputy can serve the rule: *Falvey v. Jones*, 80 Ga. 130. In this state, service of legal process, when made by the sheriff or deputy sheriff, is evidenced by an official return. Such is the uniform practice, and there is no provision of law for verifying official service by any other means. It follows that when the judgment recites service, and there is a return, the recital is always based upon the return, and the two are to be construed together. This recital, therefore, being silent as to the mode of service, and the return showing that the mode was not personal service, but by leaving a copy at the defendant's residence, the conclusion results that the rule was served as the return specifies, and not otherwise. All this appeared and still appears on the face of the record, that is, on what is termed in some jurisdictions "the judgment roll." But the only service which the sheriff could legally make, and the only service effected less than four months before the term of court at which the judgment of foreclosure was rendered which could be valid, would be personal service. Service by leaving a copy at the defendant's residence is unauthorized and insufficient: *Dykes v. McClung*, 74 Ga. 382; *Meeks v. Johnson*, 75 Ga. 630. Due service is no less requisite to give the court jurisdiction of the person and the subject-matter in foreclosure proceedings than in ordinary personal actions. In *Moore v. Starks*, 1 Ohio St. 369, which was such a proceeding, it was held — no doubt correctly — that before the court can act, it is necessary that it should acquire jurisdiction over the person of the defendant as in any other adversary proceedings. It was held that jurisdiction over both the person and the thing is absolutely requisite to the validity of the judgment. In ordinary actions, "jurisdiction over the defendant is obtained by his voluntary appearance in the action, or by the service of process. . . . If a defendant neither appears nor is served with process, a judgment against him is void": Freeman on Void Judicial Sales, sec. 5. Where there has been no service, the judgment is a nullity: *Parker v. Jennings*, 26 Ga. 140.

There is a well-founded distinction between no service and irregular or defective service, the latter rendering the judgment voidable only. In this case the so-called service was, legally speaking, none at all; for as the only mode (except by publication for four months) which our law recognizes as any service whatever of a rule *nisi* to foreclose a mortgage, is personal service, the leaving of a copy of the rule at the defend-

ant's residence can be no more effectual than the leaving of it at the residence of any other person. Were the sheriff to leave it at his own residence, and return that he had done so and thereby served the defendant, the service would be quite as good as that which was returned in this instance. That the return is a part of the record and must be noticed even by a purchaser, in connection with the judgment reciting service, is well established by respectable authority: *Settlemyer v. Sullivan*, 97 U. S. 444; *Botsford v. O'Conner*, 57 Ill. 73; *Pol-lard v. Wagener*, 13 Wis. 569; 1 Herman on Estoppel and Res Adjudicata, sec. 362; Freeman on Judgments, sec. 125; and see Wade on Notice, secs. 1361-1382. There is nothing contrary to this position in *Hightower v. Williams*, 38 Ga. 597, in which case the recital in the judgment showed due service, whether construed alone or in connection with the rest of the record. The effort was, not to supplement, explain, and qualify by other parts of the same record, but to overcome the recital by extrinsic testimony. Here, on the contrary, there is no resort to extrinsic evidence, but only an application of the rule that the whole record or judgment roll is to be read together.

6. The bill of exceptions brought by the defendants below, which goes only to rulings of the court touching the exclusion of evidence previously received, is without the shadow of merit; for although the maker of a note given for the purchase-money of fertilizers cannot waive the right to set up, as a defense to an action upon the note, the illegality of the contract for lack of inspection of the fertilizers, or for lack of any other requisite to render the sale and purchase compatible with the law of the land, yet by failure to repudiate the waiver and set up and establish the illegality as a defense to that action, the right to raise the question is forever gone when final judgment has been rendered. The judgment is conclusive upon all defenses which could have been presented in the exercise of due diligence. The court did right to rule out and withdraw from the jury all evidence upon that subject. Indeed, none of it ought to have been admitted.

Judgment on both bills of exceptions affirmed.

EJECTMENT, TITLE NECESSARY TO SUPPORT AN ACTION OF: *Green v. Jordan*, 83 Ala. 220; 3 Am. St. Rep. 711, and note; *Barrett v. Hinckley*, 124 Ill. 32; 7 Am. St. Rep. 331, and note; *McKay v. Williams*, 67 Mich. 547; 11 Am. St. Rep. 597, and note.

Plaintiff must recover upon the strength of his own title, not upon the

weakness of defendant's title: *Coffin v. Freeman*, 82 Me. 578; *Duncan v. Able*, 99 Mo. 188; *Marvin v. Elliott*, 99 Mo. 616; *Low v. Settle*, 32 W. Va. 600; *Winter v. White*, 70 Md. 305.

Plaintiff may base an action of ejectment upon title by adverse possession: *Barnes v. Light*, 116 N. Y. 34; *Hall v. Caperton*, 87 Ala. 285; *Ratcliffe v. Iron Works Co.*, 87 Ky. 559.

Plaintiff need not always show title out of the state: *Jones v. Bland*, 116 Pa. St. 190. Title acquired at a judicial sale may suffice: *Mobley v. Griffin*, 104 N. C. 112; *Findley v. Johnson*, 84 Ga. 69. In *Conwell v. Mann*, 100 N. C. 234, it is decided that a plaintiff, to maintain an action of ejectment, may show title by a connected chain from the state; or by showing title out of the state, and seven years' adverse possession under color of title; or twenty-one years' adverse possession under color of title, regardless of any title out of the state; or by showing the defendant to have been his tenant when the action was instituted.

As against trespassers, plaintiff, to maintain the action, need only be a homestead claimant: *Whittaker v. Pendola*, 78 Cal. 296; or claim under a state patent: *Hebbron v. Graves*, 78 Cal. 380; or prove actual prior possession under color of title: *Louisville etc. R. R. Co. v. Philyaw*, 88 Ala. 264; *Hacker v. Horlemus*, 74 Wis. 21; *Ware v. Dewberry*, 84 Ala. 568. But claiming possession under a timber-culture entry alone is insufficient to support ejectment against one in actual possession: *Schultz v. Hadler*, 39 Minn. 191.

PLEADING — AMENDMENT. — A declaration cannot be so amended as to introduce an entirely new cause of action: *Connecticut etc. Ins. Co. v. Kinne*, 77 Mich. 231; 18 Am. St. Rep. 398, and note.

JUDGMENT, RECITAL OF SERVICE OF PROCESS IN. — The statute requiring a return of service of process to state certain jurisdictional facts, no presumption arises in favor of a judgment based upon a return omitting such facts; and upon collateral attack such judgment is void: *Shenandoah V. R. R. Co. v. Ashby*, 86 Va. 232; 19 Am. St. Rep. 898, and note.

JUDGMENTS ARE MERE NULLITIES, when rendered without due service of process upon defendant, or an appearance by him in person or by attorney: *Green v. Green*, 42 Kan. 654; 16 Am. St. Rep. 510, and note.

JUDGMENTS ARE CONCLUSIVE, not merely of matters actually litigated, but of every matter which might have been litigated: *Lorillard v. Clyde*, 122 N. Y. 41; 19 Am. St. Rep. 470, and note. For the rule as to the conclusiveness of a judgment in an ejectment suit, see *Marsteller v. Marsteller*, 132 Pa. St. 517; 19 Am. St. Rep. 604, and note.

GEORGIA RAILROAD AND BANKING COMPANY v. NELMS.

[83 GEORGIA, 70.]

MACHINERY, WHAT IS NOT. — A HAMMER is a tool or instrument ordinarily used by one man in the performance of manual labor, and when disconnected from any other mechanical appliance, and operated singly by muscular strength directly applied, such tool or instrument is not machinery, within the meaning of the statute creating a presumption that a person injured by the machinery of a railway company was injured through the want of care and diligence of the company or its agents.

MASTER AND SERVANT — BURDEN OF PROOF. — **THOUGH A SERVANT IS INJURED**, while in the service of his master, from the breaking of a tool furnished by the latter, no presumption of negligence arises against him; and the servant, before he can recover for such injury, must show that the tool was defective, and that the master knew it, or could have ascertained it by the exercise of ordinary care and diligence. The mere fact that the tool and other tools of the same description were defective, and that injury resulted therefrom, is not sufficient to authorize a jury to infer negligence on the part of the master in their purchase and selection.

MASTER AND SERVANT. — PRESUMPTION EXISTS IN FAVOR OF MASTER THAT HE DISCHARGED HIS DUTY to the servant by providing suitable instrumentalities for the business, and in keeping them in proper repair, and if they are shown to have become defective, that the master did not have notice of such defect; and this presumption continues, notwithstanding an accident has happened and the servant has been injured in consequence of a defect in some tool or other instrumentality furnished him by his master.

J. B. Cumming, A. C. McCalla, and Bryan Cumming, for the plaintiff in error.

J. N. Glenn and A. M. Speer, for the defendant in error.

SIMMONS, J. Nelms brought his action against the Georgia Railroad and Banking Company for damages, in which he alleged, in substance, that he was employed by said company to assist it in changing the gauge of its track, and that the company furnished him and other employees with certain tools and implements with which to take up the iron rails and refasten them to the cross-ties; that hammers of certain shapes, weights, purity of steel, and of the proper temper were required in order that such work should be done with safety and dispatch; that the petitioner was furnished with a hammer to drive spikes; that he believed he had been furnished with one of the proper temper, etc., and that, knowing nothing to the contrary, he entered upon such work under the direction and control of said company's officers; and while so

engaged in drawing spikes for said company, he was hurt, wounded, and maimed by the breaking of the hammer so furnished him, said breaking causing pieces thereof to fly off with great force and violence, a piece striking the knee-joint of the petitioner, which penetrated and entered into said knee-joint, causing great pain, suffering, etc., and permanently injuring said knee; and a piece also striking him near the eye, imbedding itself deep in the flesh near the eye-ball, which also gave him great pain and uneasiness, and endangered the loss of the sight of said eye. By reason whereof he was damaged, etc.

On the trial of the case, the jury returned a verdict of two thousand dollars; a motion was made for a new trial, which was overruled, and the defendant excepted.

The only ground of the motion for a new trial which it is necessary to notice is the ground that the verdict was contrary to law and to the evidence. The evidence as shown in the record is, in substance, as follows: That the plaintiff was employed by the company to assist in changing the gauge of the railroad; that he worked under Brooks, who was the boss of the hands; that Brooks put him to work with a hammer to drive spikes, directing him to drive up the spikes where they were bent under the iron, and that he instructed him, where he found a spike that was not down and was bent, to turn the small face of the hammer down, and put it on the head of the spike and drive it up. Thus the hand with whom he was working, driving spikes, used his hammer as a punch, putting its small face on the head of the spike, while the plaintiff with his hammer struck the upturned large face of the hammer which was held on the spike, and the spike was in this way driven up. In doing this, a piece of his hammer burst off, a part of it striking him on the knee, and another piece on the right eye. All the other hands used their hammers in the same way. He was hurt about nine o'clock in the morning, having commenced work about five o'clock. Other hammers broke besides his, but he did not know whether any broke before he was hurt or not; his hammer was a new one, and some of the others might have had old ones; he had never seen any hammers break before that time; he had worked on other railroads before, and had done this kind of work; he did not examine the hammer, "any more than just going to take up a tool to work with"; he did not see anything the matter with it.

Two of the railroad hands who were at work on the same day, and at the same place with the plaintiff, testified for him. One of them testified as to pieces flying off of the hammer; he said they "got to flying like thunder"; "they were flying with force; they could hear them whistling"; that Brooks told them to "work up"; most of the hammers burst, their faces split or shelled off; some of them were old and some of them new hammers; nearly all of them broke; they battered on them "a right smart while" before they commenced bursting; the hammers looked to be all right when they picked them up, and looked to be first-class hammers, and "they" said they were first-class. The other witness testified as to several of the hammers breaking. He said he thought his was the first to break; that he could not hit the spikes with his hammer, and he got a new hammer out of the car, which did not break; that he paid no attention to the hammers to see whether they were breaking or not; that if two pieces of steel struck together, and they were very hard, they were likely to break.

This case seems to have been tried under section 3033 of the code, which declares that "a railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." The judge charged the jury, in substance, that when the injury was shown, the presumption was against the railroad. The declaration alleges and the evidence shows that the injury sustained was caused by the breaking of a hammer in the hands of the plaintiff. We do not think that a hammer thus used comes under the term "machinery," used in the above section. The supreme court of Alabama, in the case of *Georgia Pacific R'y Co. v. Brooks*, 84 Ala. 138, in discussing the statute of that state, somewhat similar to our statute, says: "A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be made an essential part of machinery when it is intended to be and is operated by means thereof; but when disconnected from any other mechanical appliances, and operated singly by muscular strength directly applied, such tool or instrument is not

machinery in its most comprehensive signification, or within the meaning of the statute." The plaintiff not being injured in any of the ways pointed out in the above section, either by the running of the cars or machinery, or by any other employee of the company, there was no presumption in his favor, or against the railroad company, as set forth in the above section. This case, therefore, is not governed by that section, but falls under the general law of master and servant. Under that law, the burden was upon the plaintiff to show negligence on the part of the defendant in supplying him with a defective hammer. Before he can recover, under the facts disclosed by this record, he must show that the hammer was defective, and that the company knew it, or could have ascertained it by the exercise of ordinary care and diligence. The mere fact that the hammer was defective, and that other hammers were defective, and that the injury resulted therefrom, is not sufficient to authorize the jury to infer negligence on the part of the company in the purchase or selection of these hammers.

Wood, in his Law of Master and Servant, section 368, says: "From the mere fact that an injury results to a servant from a latent defect in machinery or appliances of the business, no presumption of negligence on the master's part is raised. There must be evidence of negligence connecting him with the injury. The fact that machinery has been previously protected, or that, subsequent to the injury, guards were provided for it, is not evidence from which negligence may be inferred. The mere fact that the machinery proves defective, and that an injury results therefrom, does not fix the master's liability. *Prima facie* it is presumed that the master has discharged his duty to the servant, and that he was not at fault. Therefore, the servant must overcome this presumption by proof of fault on the master's part, either by showing that he knew or ought to have known of the defects," etc. "The burden of proving negligence upon the part of the master is upon the servant, and he is bound to show that the injury arose from defects known to the master, or which he would have known by the exercise of ordinary care, or that he has failed to observe precautions essential to the protection of the servants which ordinary prudence would have suggested."

The same work, section 382, says: "The servant seeking to recover for an injury takes the burden upon himself of establishing negligence on the part of the master, and due care on

his own part. And he is met by two presumptions, both of which he must overcome in order to entitle him to a recovery. First, that the master has discharged his duty to him by providing suitable instrumentalities for the business, and in keeping them in condition, and this involves proof of something more than the mere fact that the injury resulted from a defect in the machinery. It imposes upon him the burden of showing that the master had notice of the defect, or that in the exercise of that ordinary care which he is bound to observe, he would have known it. When this is established, he is met by another presumption, the force of which must be overcome by him, and that is, that he assumed all the usual and ordinary hazards of the business."

Mr. Thompson, in his work on negligence, page 1053, section 48, uses the following language: "In an action by an employee against his employer for injuries sustained by the former in the course of his employment from defective appliances, the presumption is, that the appliances were not defective; and when it is shown that they were, then there is a further presumption that the employer had no notice or knowledge of this fact, and was not negligently ignorant of it." See also Pierce on Railroads, 382.

Applying these rules to the evidence, we do not think that the plaintiff was entitled to recover. There was no evidence in the record going to show any negligence whatever on the part of the company or its officers, unless it could be inferred from the fact that other hammers broke the same day; and as we have seen from the above extracts, that is not sufficient proof of negligence. On the contrary, there is evidence to show that, as far as could be ascertained from an examination of the hammers, they are first-class. Other witnesses said that they looked as if they were first-class, and that "they" (meaning, we suppose, the officers of the company) said they were first-class. We cannot hold—for in our opinion it is not the law—that an employer is liable to his servant when he furnishes him with an ax, a wagon, a saw, a hammer, or any other tool which appears to be first-class, and which subsequently, by some latent defect, breaks and injures the servant. If such were the law, every farmer, contractor, or other employer would be liable to his employee when he furnished him tools, and they broke and injured him on account of some latent defect which could not be ascertained by the exercise of ordinary care.

For these reasons we hold that this verdict was contrary to law and to the evidence, and that the trial judge erred in refusing to grant a new trial upon this ground. See also *Reid v. Central R. R. etc. Co.*, 81 Ga. 694.

Judgment reversed.

MACHINERY — TOOLS. — As to what is included in the meaning of the words "machinery" and "tools," see *Consolidated G. Co. v. Mayor*, 60 Md. 588; 50 Am. Rep. 237; *Frantz v. Dobson*, 64 Miss. 631; 60 Am. Rep. 68; *Green v. Raymond*, 58 Tex. 80; 44 Am. Rep. 601, and note 603, 604; *Lovewell v. Westchester F. Ins. Co.*, 124 Mass. 418; 26 Am. Rep. 671, and foot-note.

MASTER AND SERVANT — SERVANT INJURED BY DEFECTIVE TOOLS OR MACHINERY, WHAT MUST SHOW IN ORDER TO RECOVER. — In an action to recover against a master for injuries sustained through defective appliances, tools, or machinery, the servant must allege that his master either knew, or by the exercise of ordinary care might have known, of the defects in the construction of the appliance, tool, or machinery: *Johnson v. Missouri P. R'y Co.*, 96 Mo. 340; 9 Am. St. Rep. 351, and note; *Hoffman v. Dickinson*, 31 W. Va. 143; *Carey v. Sellers*, 41 La. Ann. 500. In such cases, negligence is never presumed against the master: *Wormell v. Maine C. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321; *Texas etc. R'y Co. v. Crowder*, 76 Tex. 499; *Lennon v. Rawitzer*, 57 Conn. 583; *Hudson v. Charleston etc. R. R. Co.*, 104 N. C. 491; *Western etc. R. R. Co. v. Vandiver*, 85 Ga. 470; *Anderson v. Minnesota etc. R. R. Co.*, 39 Minn. 523; *Georgia Railroad v. Bryans*, 77 Ga. 429; *Dobbins v. Brown*, 119 N. Y. 183.

FOWLER v. ATHENS CITY WATER-WORKS Co.

[83 GEORGIA, 219.]

MUNICIPAL CORPORATION. — ONE WHO CONTRACTS WITH A CITY TO FURNISH WATER to be used in extinguishing fires is not liable to an action by a tax-payer who claims to have suffered the loss of his property by the failure of the defendant to furnish water according to his agreement; because there is no privity of contract between such contractor and tax-payer.

T. W. Rucker and S. H. Hardeman, for the plaintiff.

Lumpkin and Burnett, for the defendant.

BLECKLEY, C. J. Fowler brought action against the Athens City Water-works Company, making the following allegations in his petition: In August, 1882, the mayor and council of the city of Athens contracted with one Robinson; in which contract Robinson undertook that he would furnish at all times, for a consideration mentioned in the contract, all the water necessary for fire purposes; that he would establish fire-hydrants to the number of fifty-five, and would guarantee at all times

a sufficient pressure to throw from any of these hydrants, through a one-inch nozzle, and fifty feet of two-and-a-half-inch hose, five streams of water to the height of sixty-five feet; that Robinson, for a valuable consideration, in 1882, transferred this contract to the defendant; that the defendant is paid by a tax levied on the property of the citizens of Athens; that the petitioner, since 1882, has been a resident and a taxpayer of Athens, for many years owning a certain house and lot mentioned; that the defendant ran its mains along the street by his house, and established near his house two fire-hydrants; that in July, 1887, some of the out-houses on the lot caught on fire without his fault; the fire extended to the main dwelling, and all were consumed; that the alarm of fire was promptly responded to, and the fire companies were on hand at a time when it could have been easily controlled, but there was so little pressure that the water would not go ten feet beyond the nozzle, and was of no use in putting out the fire; that if proper pressure had been put on, the fire could easily have been extinguished and the property saved. Damages were laid at fifteen hundred dollars. At the trial a contract corresponding with that described in the declaration was put in evidence. By it the city agreed to pay to Robinson, his successor or assigns, for thirty years from the completion of the water-works, as a rental for the use of the hydrants and for the supply of water for the purposes mentioned in the agreement, the sum of three thousand dollars annually. It was proved that the defendant had succeeded to the position of Robinson, in the contract, and had received from the city rents accordingly, undertaking to carry out the terms of the contract. The occurrence of the fire, the consumption of the plaintiff's buildings, his loss, and the failure of the company to have a water supply on the occasion equal to that provided for by the contract, or any supply adequate to the exigencies of the fire, also appeared in evidence. The court, on motion of the defendant, ordered a nonsuit. This is the error complained of.

The question of liability was argued briefly, but ably, on both sides. To the authorities cited by counsel, our own research has added nothing of much value.

In *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713, the duties of the contractor did not rest on contract alone, but were prescribed by statute. The court analogized his position to that of a public officer, in respect both to his duties and his

powers. Stress was also laid upon his undertaking to repair a public thoroughfare (the canal), and that this was a public function formerly devolving on public officers. In *Couch v. Steel*, 3 El. & B. 402, the duty neglected was also one imposed by statute. Such, likewise, was the duty in *Atkinson v. Newcastle Co.*, L. R. 6 Ex. 404, which case was reversed on appeal, L. R. 2 Ex. Div. 441, the appellate court holding that, under a proper construction of the particular statute involved, the action would not lie. The court, composed of Lord Cairns, L. C., Cockburn, C. J., and Brett, L. J., intimated doubts as to the correctness of the judgment in *Couch v. Steel*, 3 El. & B. 402. In *Metallic Com. Casting Co. v. Fitchburg R. R. Co.*, 109 Mass. 277, 12 Am. Rep. 689, the act complained of was a plain tort of the indirect kind, and no contract relation whatever was involved. It was held in *Willy v. Mulledy*, 78 N. Y. 319, 34 Am. Rep. 536, that the neglect of a duty imposed by statute would give a right of action to any person having a special interest in its performance, and injured by the breach. The present case is not based upon the breach of a statutory duty, but solely upon failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for the want of the requisite privity between the parties before the court. A case directly in point is *Davis v. Clinton Water Works Co.*, 54 Iowa, 59; 37 Am. Rep. 185. See also *Nickerson v. Bridgeport H. Co.*, 46 Conn. 24; 33 Am. Rep. 1.

There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or non-feasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a tax-payer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire: *Wright v. Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256; 7 Am. & Eng. Ency. of Law, 997 et seq. We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law.

There was no error in granting the nonsuit.

Judgment affirmed.

MUNICIPAL CORPORATIONS—WATER COMPANY, WHETHER ANSWERABLE TO TAX-PAYERS.—Where a city contracts with a water company for a supply of water to extinguish fires, such supply to be paid for by the levy of a special tax, there is no privity of contract between the company and the tax-payers, authorizing them to sue the company for property destroyed by fire, caused by a failure to supply water: *Becker v. Keokuk Water Works*, 79 Iowa, 419; 18 Am. St. Rep. 377, and particularly note 380, 381.

JENKINS v. JENKINS.

[88 GEORGIA, 288.]

PRESUMPTION OF MARRIAGE FROM COHABITATION AND REPUTE WILL NOT BE INDULGED when the question is, which of two legal marriages is valid, and the second is proven by direct evidence, and the first is sought to be established only by evidence of cohabitation and repute. The law, in opposition to a marriage actually proved, will not indulge the presumption that one of the contracting parties was already married; but the jury may consider such cohabitation and repute, in connection with other evidence tending to establish the first marriage.

MARRIAGE.—CIRCUMSTANTIAL AS WELL AS DIRECT EVIDENCE MAY BE CONSIDERED BY A JURY IN SUPPORT OF AN ALLEGED MARRIAGE, although one of the parties to such marriage is shown, by direct and undisputed evidence, to have contracted a subsequent marriage while the first, if valid, remained undissolved.

John A. Wimpy, for the plaintiffs in error.

R. J. Jordan, for the defendant in error.

BLECKLEY, C. J. This, at bottom, is a controversy between two ladies over property. These litigants may be distinguished by the lady Theresa and the lady Josie. The former claims alimony out of property which Jenkins, the disputed husband, conveyed to the latter in April, 1887, by deed founded on love and affection. The marriage of Jenkins to Josie, in October, 1886, publicly, in Atlanta, Georgia, by license and a clergyman, in the presence of many witnesses, is clearly proved by the evidence, and indeed was an admitted fact in the pleadings. An alleged previous marriage by the same Jenkins, with Theresa, is in dispute. This marriage, if it occurred at all, took place in June, 1882, at Stapleton, on Staten Island, state of New York, by a clergyman, in the presence of only one person. The name of the clergyman has been forgotten and the name of the other person, who was an aged female, is not remembered in full, her Christian name having also been forgotten.

Jenkins was a United States soldier in garrison on the

island. In November, 1884, his time of service having expired, he came to Atlanta and located there, bringing Theresa with him. He resided in Atlanta nearly two years before separating from her. According to her testimony, she bore three children, two of whom are dead. Both upon the island and in Atlanta, according to some of the evidence, he recognized her as his wife, introduced her as such, and cohabited with her. After the separation, he agreed to make her a small monthly allowance in money, which he paid to her for several months, and then discontinued the payment. She testified on the trial of the present case to the fact of the marriage, and that the clergyman gave her a marriage certificate, which she kept until Jenkins took it away from her in Atlanta and burnt it up. She stated that while residing on the island she kept this certificate in a frame, hung up in her room, where it could be seen and read. One of her witnesses testified that he had seen it and read it. Jenkins, in his testimony, denied that any marriage took place, or that there was any marriage certificate, or that he had destroyed it. In its last analysis the case resolved itself into a question of credibility of witnesses, the only two witnesses examined who knew whether the marriage actually took place being Theresa and Jenkins, both of them parties to the bill, one as complainant and the other as defendant. The jury found for the complainant, thereby indorsing her credit and repudiating his.

The proceeding was for alimony only, as authorized by section 1747 of the code, and it was claimed in behalf of both the complainant and her child. The bill was filed in June, 1887. The jury allowed fifteen dollars per month, and made it a charge upon the property in controversy. A motion was made for a new trial, on the usual grounds, and because the court erred in charging the jury thus: "Circumstantial evidence is that which tends to prove the fact in question by the proof of other facts from which it may be inferred. If the fact to be proved were a marriage, an instance of direct testimony would consist in the sworn statement of a witness who was present at the marriage and observed the performance of the ceremony. An example of circumstantial evidence in a case of that kind would consist in such a set of facts surrounding the parties supposed to be man and wife, in their relation to each other and attendant upon their lives, as that, from these facts, it could be reasonably inferred that a marriage had occurred."

1. The evidence is voluminous, and every word of it has

been carefully read, and the whole carefully considered. The material circumstances, except the one fact of marriage in Atlanta, with Josie, shortly after ceasing to cohabit with Theresa, all tend to support and corroborate the testimony of Theresa. If her testimony was true, the verdict was undoubtedly correct.

2. Whether the court erred or not in defining circumstantial evidence is easily seen by comparing the charge complained of with section 3748 of the code, which states that "direct evidence is that which immediately points to the question at issue. Indirect or circumstantial evidence is that which only tends to establish the issue by proof of various facts sustaining, by their consistency, the hypothesis claimed." The charge as given first described direct evidence as "that which points immediately to the fact to be proved," and then proceeded to circumstantial evidence, etc., in the language quoted from the motion for a new trial. We think that in sense and substance the charge and the code are identical; nor do we understand the learned counsel for the plaintiff in error to deny this. But his point in argument was, that the court should have delivered no charge whatever upon circumstantial evidence, inasmuch as an actual marriage, regular in all respects, with Josie, was established by direct evidence. He relies upon 1 Bishop on Marriage and Divorce, secs. 444-446, as illustrated by *Taylor v. Taylor*, 1 Lee (5 Eng. Ecc.), 571; *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Poultney v. Fairhaven*, Brayt. 185; *Clayton v. Wardell*, 5 Barb. 214; 4 N. Y. 230; *Myatt v. Myatt*, 44 Ill. 473; *Jones v. Jones*, 45 Md. 144; *Jones v. Jones*, 48 Md. 391; 30 Am. Rep. 466.

Some of these cases may go to the extent contended for; but Mr. Bishop's summing up of the result (section 446) is this: "In general, and by the opinions of most judges, if, while three persons are living, two of them cohabit matrimonially, and then, separating, one of them and the third do the same, no marriage in either instance will be presumed from such mere cohabitation and repute. But if the actual fact of a marriage is proved as introducing either one of the cohabitations, it will not be invalidated by the evidence of the other." That Bishop intends to draw a distinction between presuming a marriage from mere cohabitation and repute, and proving a marriage by circumstantial evidence, is plain from what he says in subsequent sections: Secs. 485-493.

The true doctrine of the authorities is, that where two alleged marriages compete, and one of them is proved as a fact, whether by direct or circumstantial evidence, the other cannot be left to stand upon the mere legal presumption founded on cohabitation and repute. But withdrawing from certain facts their consequence as a presumption of law does not prevent them, in connection with other indirect facts, from becoming plenary proof as a presumption of fact distinguished from a presumption of law. Our code, section 3752, says: "Presumptions are either of law or of fact. The former are conclusions or inferences which the law draws from given facts; the latter are exclusively questions for the jury, to be decided by the ordinary test of human experience." Where there is a legal presumption, the law does the reasoning, and draws the inference; where presumptions of fact are involved, the jury are left to do the reasoning, and to make an inference or not, according as they shall believe the premises warrant. With no competing actual marriage proved, the law presumes marriage from cohabitation and repute. But this presumption the law declines to raise in opposition to a competing marriage actually proved. Here the jury were not instructed to apply any legal presumption whatsoever, but were left to use all the evidence, both direct and circumstantial, in ascertaining whether the actual fact of marriage was established.

In another part of the charge they were instructed that "the burden of proof in this case is upon the complainant. What that means is, that it is for the complainant to satisfy you of a marriage between her and the defendant John R. Jenkins, and all the other facts essential to a recovery on her part, and not for the defendants to show to the contrary. The complainant carries this burden when she shows you that the greater weight of evidence is in her favor." Again, "If you believe from the evidence, after you have considered it all fairly, that the complainant was married to John R. Jenkins, as she alleges, etc., then you ought to find in favor of the complainant. . . . On the other hand, if you should believe from the evidence, after you have attentively gone over it all, that there was never any marriage between the complainant and the defendant John R. Jenkins, then your verdict ought to be in favor of both these defendants."

It is plain that the court intended the case to turn upon the establishment or non-establishment of an actual marriage by the complainant with Jenkins as a matter of fact solely, and

with no aid from any legal presumption whatsoever. We can recognize as sound law for us no authority which prevents actual marriage from being established by circumstantial as well as by direct evidence. According to section 3750 of the code, the rules of evidence on all trials are the same, save where exceptions are made by statute. We have no statute that confines the proof of marriage in any case to direct evidence, or declares that marriage cannot be shown as a fact by circumstantial evidence. In this case both classes of evidence were combined, and the court was correct in explaining the nature of both to the jury, and in not restricting the jury to the consideration of one class only.

Judgment affirmed.

MARRIAGE, EVIDENCE OF. — As to the effect of cohabitation and reputation to establish the existence of a marriage, see *Voorhees v. Voorhees*, 46 N. J. Eq. 411; 19 Am. St. Rep. 404; *Appeal of Reading etc. Tr. Co.*, 113 Pa. St. 204; 57 Am. Rep. 448, and note 451 et seq.; note to *State v. Hodgskins*, 38 Am. Dec. 746, 747; note to *Taylor v. Swell*, 22 Am. Dec. 159-161.

THORNTON v. AMERICAN WRITING-MACHINE COMPANY.

[83 GEORGIA, 288.]

PRIVILEGE. — **SUITOR OR WITNESS IN ATTENDANCE UPON THE TRIAL OF ANY CASE IN COURT IS EXEMPT** from the service of any writ or summons upon him; and if he is served with such writ while so in attendance on the court, he may either have the service vacated on motion, or file a plea in abatement of the suit or summons, and insist, by his plea, upon his privilege.

PRIVILEGE. — **SERVICE OF PROCESS ON A SUITOR OR WITNESS, WHEN HE IS IN ATTENDANCE IN COURT, IS NOT VOID**, though voidable. If he does not claim his privilege in any manner, but remains silent, and judgment is entered against him, it is valid, and the court will not vacate it on his motion, made nearly eighteen months after its entry.

J. H. Smith, for the plaintiff in error.

Hoke and Burton Smith, for the defendant in error.

SIMMONS, J. The American Writing-machine Company commenced its action against W. K. Tewksbury & Co. for \$1,109.25. On the 19th of January, 1886, affidavit was made and bond given for the issuance of summons of garnishment in said suit, and on the same day a summons of garnishment was issued and served personally by the sheriff, upon M. E.

Thornton. It was made returnable to the next term of the superior court of said county. No answer was filed to this summons to the first term of the court. At the second term, to wit, on the 4th of November, 1886, no answer having been filed, judgment was entered against Thornton by default. On the 17th of August, 1888, Thornton filed his petition to the superior court to set aside the judgment, on the following ground, to wit: That at the time he was served with said summons of garnishment he was a citizen of the state of Kentucky, and not a citizen of Georgia; that he was in the state of Georgia temporarily, as a suitor and witness in his own case, to wit, the case of *Thornton v. Conley*, then being tried in the superior court of Fulton County; that during the progress of said trial, and on the day on which he was served with said summons of garnishment, his case was on trial in said court, and he was sworn and testified as a witness therein; that being a non-resident, and a suitor and witness in said court, he was exempted by law from being served with civil process while in attendance upon said court as a suitor or witness; that the plaintiff and its attorneys knew that he was a non-resident, and a suitor and witness in said case; and that the summons of garnishment served upon him was therefore illegal and void, and the judgment entered thereon likewise illegal and void; and he prayed the court to set the same aside for these reasons. The trial judge refused to set aside the judgment, and Thornton excepted and brought the case here.

The law seems to be that a suitor or a witness in attendance upon the trial of any case in court is privileged from arrest under any civil process, and is exempted from the service of any writ or summons upon him or them while in attendance upon such court, or in going to or returning therefrom. If a suitor or witness is arrested, or if civil process is served upon him while thus in attendance on the court, the court, upon application made in proper time, will order his discharge from arrest, or will set aside the service of the civil process. The practice in cases of this sort seems to be, where a party is arrested, to move the court for a discharge, or where served with civil process, to move to set aside the service, or else file a plea in abatement to the suit or summons, and insist, in his plea, upon his privilege. The service of the civil process is not void, but voidable, upon proper action in the proper time by the person served: *Atchison v. Morris*, 11 Fed. Rep. 582, and cases

there cited; *Larned v. Griffin*, 12 Fed. Rep. 590, and cases cited; *Palmer v. Rowan*, 21 Neb. 452; 59 Am. Rep. 844, and cases cited; 1 Tidd's Practice, sec. 81; notes to *Prentiss v. Commonwealth*, 16 Am. Dec. 784.

It will be seen, by reference to the facts in this case, that Thornton, the person garnished, did not pursue either of these remedies, but paid no attention to the summons, and waited until nearly eighteen months, before he moved to set aside the judgment. In our opinion, he should have applied to the court at the time he was served with summons of garnishment, to set aside the service, or he should have filed his answer to said summons, setting out and claiming his privilege and exemption from said service. If he had done either, doubtless the court would have set aside the service in the first instance, or would have sustained his plea in the second. But as said before, he did neither. He remained silent, filed no answer or plea, and the court entered judgment against him by default. In our opinion, it was then too late to move to set aside the judgment on the ground that his privilege as a suitor and witness had been violated. The judgment was not void. The court which rendered it had jurisdiction both of the person and the subject-matter. The code, section 21, declares that "the jurisdiction of this state and its laws extend to all persons while within its limits, whether as citizens, denizens, or temporary sojourners." Section 3304 declares, in substance, that where any person who has been served with summons of garnishment fails to answer at the first or second term, judgment shall be entered up against him as in cases of default. In the case of *Matthews v. Puffer*, 10 Fed. Rep. 606, Blatchford, J., in treating of this subject, says: "The objection to the service as made while the defendant was protected by a privilege was one which the defendant could waive, and one which he might waive by not making it when he ought to make it, or by not making it in a proper way, as well as by not making it at all. It is one of those irregularities which must be promptly availed of." Freeman on Judgments, in discussing judgments against privileged persons, says (sec. 496): "If process be served, the defendant must appear and protect his interests. If he is privileged from service as a member of a legislative or other political body, the privilege is a personal one, which must be claimed by motion in the case. Courts cannot, *ex officio*, take notice of the persons thus privileged. And if, in the absence of any

claim being interposed, judgment is pronounced against them, it will not be intermeddled with in equity."

In the case of *Peters v. League*, 13 Md. 58, 71 Am. Dec. 622, it was held "that service of process upon a privileged person is not void, but a mere irregularity which may be waived by a trial or confession of judgment. The privilege must be claimed by plea or motion in the particular case, made at the proper time. In the case of *Prentis v. Commonwealth*, 5 Rand. 697, 16 Am. Dec. 782, it was held that "the privilege of a member of assembly cannot be noticed by the courts *ex officio*. As it may be waived, it must be claimed; and it can only be claimed by plea, or on motion tendered or made at the proper period. If a member of assembly allows a judgment to be rendered against him during the existence of his privilege, and does not seek, during the progress of the proceedings, either to abate or suspend them, he will be deemed to have waived his privilege, and he cannot afterwards be allowed the writ of error *coram vobis* to reverse the judgment." See also note to the same case, reported in 16 Am. Dec. 784, where it is said that "every privileged person must, at a proper time and in a proper manner, claim the benefit of this privilege. The judge is not bound to notice a right of privilege, or grant it without a claim."

While Thornton's privilege as a suitor and witness may have exempted him from service of this summons of garnishment, he should, in some way, have called the attention of the court to the same, either by moving to set aside the service, by plea in abatement, or perhaps by plea to the jurisdiction, as was done in *Palmer v. Rowan*, 21 Neb. 452; 59 Am. Rep. 844. Not having done so, and judgment having gone against him by default, in our opinion it was too late after that to move to set aside the judgment because his privilege had been violated by service of process while in attendance upon the court as a suitor and witness: *King v. Phillips*, 70 Ga. 409.

We have been unable to find any case where a judgment has been set aside on the ground of violation of the privilege of the defendant. All the cases cited by the plaintiff in error were either upon motions to set aside the service, or on pleas in abatement or to the jurisdiction.

Judgment affirmed.

WITNESS — IMMUNITY FROM PROCESS. — As to the privilege of a witness with respect to immunity from service of process, see *In re Healey*, 53 Vt. 694; 38 Am. Rep. 713, and particularly note 717-722, wherein the immunity

of one who is a suitor is also discussed. But service of process upon a resident while voluntarily attending a trial as a witness is not void; though the court may set it aside: *Massey v. Colville*, 45 N. J. L. 119; 46 Am. Rep. 754. A person who is privileged from service of process may waive his privilege: *Peters v. League*, 13 Md. 58; 71 Am. Dec. 622.

In *Andrews v. Lembeck*, 46 Ohio St. 38, it was decided that a person attending a hearing of an application for an injunction, being interested as a party, in a county not the county in which he resides, is privileged from service of process while going to, attending, and returning from such place. So a service of summons made upon a party to a suit while attending as a witness in another county, not the county of his residence, was held irregular: *Letherby v. Shaver*, 73 Mich. 500. A non-resident coming into a state as a witness in a suit in which he is a party cannot legally be served with process at the instance of the plaintiff in the action he came to defend: *Wilson v. Donaldson*, 117 Ind. 356.

BLOOD BALM COMPANY v. COOPER.

[83 GEORGIA, 457.]

MEDICINES SOLD TO DRUGGIST TO BE RESOLD. — ONE WHO FURNISHES OR SELLS A DANGEROUS MEDICINE OR DRUG to a druggist for the purpose of having the latter sell it to his customers and others is, on the latter's making such sales, liable to the same extent as if he had sold it himself without the intervention or aid of such druggist.

MEDICINES, LIABILITY FOR SALE OF DANGEROUS. — One who manufactures a patent or proprietary medicine, concealing its contents from the public, and selling it to druggists, to be by them offered for sale to the public, in bottles containing directions for its use, specifying the quantity in which it should be taken, is answerable to one who purchases it of the druggist and is injured by taking it in the quantities specified in the accompanying directions, if it appears that the medicine contained a drug of which the taker was not aware, and which, in his condition, if the directions given were followed, would probably produce the injurious consequences by him suffered.

ACTION by Cooper against the Blood Balm Company to recover for injuries suffered by him from taking a patent medicine manufactured by the defendants, called "B. B. B." The plaintiff purchased of a druggist three bottles of the medicine in question. The first two, while they did not relieve plaintiff, failed to produce any visible injurious effect. He then commenced taking a third bottle. The first dose made him sick, but he continued to follow strictly the directions accompanying the bottle, and by the time half its contents were consumed, his head, neck, and breast were covered with red spots, and the inside of his mouth and throat was sore. He then commenced taking lime-juice, in accordance with the directions; but his mouth continued to grow worse, and a large

part of his hair fell from his head. It appeared from the evidence that the medicine was injurious and hurtful, because it contained an excessive amount of iodide of potash, and that in pursuing the directions plaintiff had taken daily more than sixty grains of that drug. The jury returned a verdict in favor of the plaintiff. The defendant then moved for a new trial, basing its motion therefor upon the admission in evidence of a printed circular shown to have accompanied the bottle containing the medicine bought by plaintiff, and which circular contained directions for the use of the medicine; and the defendants insisted that this circular ought not to have been received in evidence without proof that it was wrapped with the bottle by the act or the procurement of the defendant. The motion for new trial being denied, the defendant excepted.

Hillyer and Brother, for the plaintiff in error.

Hall and Hammond, for the defendant in error.

BLANDFORD, J. The main question in this case arises upon the refusal of the court below to award a nonsuit, and the solution of this question depends upon whether, where one prepares what is known as a proprietary or patent medicine, and puts it upon the market, and recommends it to the world as useful for the cure of certain diseases, the bottle containing it having therewith a prescription made by the proprietor of the medicine, in which he states that it is to be taken in certain quantities, and such medicine, accompanied with this prescription, is sold by the proprietor to a druggist, for the purpose of being resold to persons who might wish to use it, and the druggist sells the same to a person who uses it in the quantity thus prescribed, and it being shown that the same contains a certain article known as the iodide of potash in such quantity as proves harmful to the person thus using, the proprietor is liable. The plaintiff in error insists that there is no liability on the part of the proprietor, — 1. Because it was not sold by the proprietor to the person injured, but by a druggist who had purchased the same from the proprietor; and several cases are cited to sustain this position; 2. Because the drug thus sold was not imminently hurtful or poisonous.

1. We are not aware of any decision of this court upon this question; indeed, there is none; and we have searched carefully, not only the authorities cited by counsel in this case, but others, and we find no question like the one which arises

in this record determined by any court. In the case of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, 1 Thompson on Negligence, 224, referred to by counsel in this case, the question decided was, that a dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label. This comes nearer the present case than any we have been able to find, and it is relied upon by both parties as an authority; and in the notes thereto by Mr. Freeman in the American Decisions, the cases relied upon by counsel in this case are embraced and referred to, and to some extent considered. It is not denied by counsel in this case that the doctrine of the case cited (*Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455) is sound and correct law; but the present case differs from that case, and mainly in this: there the drug sold was a deadly poison, and the wrong consisted in putting a label upon the same which indicated that it was a harmless medicine; whereas in this case the medicine sold was not a deadly poison, and no label was put upon it which was calculated to deceive any one in this respect. But accompanying this medicine was a prescription of the proprietor stating the quantity to be taken, and the evidence tended to show that the quantity thus prescribed contained iodide of potash to such an extent as, when taken by the plaintiff, produced the injury and damage complained of. The liability of the plaintiff in error to the person injured arises, not by contract, but for a wrong committed by the proprietor in the prescription, and direction as to the dose that should be taken.

We can see no difference whether the medicine was directly sold to the defendant in error by the proprietor, or by an intermediate party to whom the proprietors had sold it in the first instance for the purpose of being sold again. It was put upon the market by the proprietor, not alone for the use of druggists to whom they might sell it, but to be used by the public in general who might need the same for the cure of certain diseases for which the proprietor set forth in his label the same was adapted. This was the same thing as if the proprietor himself had sold this medicine to the defendant in error, with his instructions and directions as to how the same should be taken. In all the cases cited by the plaintiff in error, there is no case in which the proprietor prescribed the doses and

quantities to be taken of the medicine sold by him. If this medicine contained the iodide of potassium in sufficient quantity to produce the injurious consequences complained of to the defendant in error, and if the same was administered to him, either by himself or any other person, as prescribed in the label accompanying the medicine, he could, in our judgment, recover for any injury he may have sustained on account of the poisonous effect thereof. It was a wrong on the part of the proprietor to extend to the public generally an invitation to take the medicine in quantities sufficient to injure and damage persons who might take it.

A medicine which is known to the public as being dangerous and poisonous if taken in large quantities may be sold by the proprietor to druggists and others, and if any person, without more, should purchase and take the same so as to cause injury to himself, the proprietor would not be liable. But if the contents of a medicine are concealed from the public generally, and the medicine is prepared by one who knows its contents, and he sells the same, recommending it for certain diseases, and prescribing the mode in which it shall be taken, and injury is thereby sustained by the person taking the same, the proprietor would be liable for the damage thus sustained. These proprietary or patent medicines are secret, or intended by the proprietors to be secret, as to their contents. They expect to derive a profit from such secrecy. They are therefore liable for all injuries sustained by any one who takes their medicine in such quantities as may be prescribed by them. There is no way for a person who uses the medicine to ascertain what its contents are, ordinarily, and in this case the contents were only ascertained after an analysis made by a chemist,—which would be very inconvenient and expensive to the public; nor would it be the duty of a person using the medicine to ascertain what poisonous drugs it may contain. He has a right to rely upon the statement and recommendation of the proprietor, printed and published to the world; and if, thus relying, he takes the medicine, and is injured on account of some concealed drug of which he is unaware, the proprietor is not free from fault, and is liable for the injury thereby sustained. It appears from the analysis made by the chemist in this case that this medicine contained twenty-five grains of the iodide of potash to two tablespoonfuls of the medicine. The testimony of the plaintiff by witnesses learned in the profession of medicine was, that iodide of potash in this quan-

tity would produce the effects upon a person using it, shown by the condition of the defendant in error. The prescription accompanying the bottle directed the taking of one to two tablespoonfuls of the medicine, and this was done by the defendant in error, and he was thereby greatly injured and damaged.

This is not like the case of a dangerous machine or a gun sold to a person, and by him given or sold to another, as in some of the cases referred to. Mr. Freeman, in his notes to the case above referred to (*Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455), alludes to all those cases; and Mr. Thompson, in his work on negligence, refers to the same cases, and they are there fully discussed.

2. The plaintiff in error further insists that a nonsuit should have been awarded in this case because the evidence does not show that the medicine was prepared by the defendant. There was evidence in the record calculated to show that it was so prepared by the defendant (the plaintiff in error here) or its agents, and also that the iodide of potash was put therein by the defendant or its servants or agents. There was sufficient evidence as to this fact to send the case to the jury for them to find what was the truth. So we think, upon the whole, the law being as we have stated it to be, that there was no error on the part of the court in refusing to grant the nonsuit.

3. There are many other grounds of error alleged in the motion for a new trial, as to certain charges of the court and refusals to charge, but looking to the charge of the court as sent up and made a part of the record, we think it was a full and fair charge upon every aspect of the case, stating the law as we understand it; and as we have frequently determined, where such is the case, the court need not charge further, even though requested to do so by either party to the case.

4. There are also some assignments of error as to the admission and rejection of testimony; but we have looked into them, and are satisfied there was no error committed by the court in ruling as he did. Under the view we take of the case, it is unnecessary to notice further, and in detail, the assignments of error.

Judgment affirmed.

THE CASE OF *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, is the leading case upon the liability of a manufacturer of poisonous drugs who sells them or causes them to be sold as harmless. See also *Loop v. Litchfield*,

42 N. Y. 351, 1 Am. Rep. 543, in which the rule as laid down in *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, is explained and distinguished. See also *Norton v. Sewall*, 106 Mass. 143; 8 Am. Rep. 298. A druggist is liable for damages for the death of one who purchased from his clerk poison which was unlabeled, and drank it in ignorance of its dangerous effects: *Osborne v. McMasters*, 40 Minn. 103.

MILLER & Co. v. MOORE, SIMS, & Co.

[83 GEORGIA, 684.]

SALE AND WARRANTY. — THE DESCRIPTIVE WORDS "No. 2 white mixed corn, bulk," comprehend quality as well as variety, and imply a warranty on the part of the seller as to both.

SALES AND WARRANTIES. — INSPECTION BY THE BUYER BEFORE ACCEPTANCE will not deprive him of the protection of a warranty as to latent defects. If a car of corn was "false packed," by placing sound corn upon the surface and that which was musty some two feet beneath, the musty corn should be regarded as a latent defect, and the purchaser is not, by his acceptance of a car, after an inspection which did not discover the fraud, precluded from subsequently recovering upon a warranty that the corn was of good quality.

USAGE CONTRARY TO LAW. — If a state law raises a warranty in favor of a purchaser, he cannot be deprived of its benefits by showing a local usage to the effect that one who receives an article and pays for it is deemed to release all claims for defects or quality, unless he is shown to have recognized and adopted such usage in his own business.

SALES. — A DEFECT IN QUALITY OF A PART OF AN INSTALLMENT of property purchased does not entitle a purchaser to reject a subsequent installment, which is free from defects, where neither party shows any intention to abandon or rescind a contract of purchase.

ACTION by Moore, Sims, & Co. against Miller & Co., relying upon a sale of thirty cars of "No. 2 white mixed corn, bulk," to be delivered at Augusta and to be paid for after arrival there and an opportunity for inspection. The corn was delivered in installments of ten-car lots, and one of these lots defendants refused to take, because of a claim made by them that three cars in a prior lot had been "false packed." The plaintiffs resold the ten cars which the defendants thus refused to accept, and the amount realized was \$178.77 less than the price which defendants had agreed to pay therefor; and in making the sale, plaintiffs incurred expenses of \$25 for brokerage, and \$9.39 for exchange. The plaintiffs sued to recover these items, aggregating \$213.16. The defendants on their part claimed that the plaintiffs had not sold the ten cars for what they were reasonably worth at the time of the sale;

that had plaintiffs made proper effort they would not have lost anything by the resale of the ten cars. The defendants interposed a counterclaim for \$238.69, based upon an allegation that three cars of corn, accepted and paid for by them, were afterwards found to be "false packed" and to contain corn of inferior quality. As against this counterclaim, the plaintiffs insisted that the acceptance of the cars was a waiver of every claim for defects in the quality of their contents, and they offered evidence that it was the custom in Augusta, after corn had been inspected, delivered, and paid for, that the sellers were no longer answerable for its condition. The court instructed the jury that after the corn had been inspected, accepted, and delivered, the plaintiffs could not be held liable, unless they were guilty of fraud, or there were latent defects. The jury returned a verdict in favor of plaintiffs for \$153.17, and defendants moved for a new trial, and their motion being overruled, they excepted.

Foster and Lamar, for the plaintiffs in error.

J. S. and W. T. Davidson, for the defendants in error.

BLECKLEY, C. J. 1. The descriptive words by which the sale was made were: "No. 2 white mixed corn, bulk." These words comprehend quality as well as variety, and import a warranty on the part of the seller as to both: Corbin's note 24 to 2 Benjamin on Sales, 844; *Gould v. Stein*, 149 Mass. 570; 14 Am. St. Rep. 455; *Whitaker v. McCormick*, 6 Mo. App. 114; *Wolcott v. Mount*, 36 N. J. L. 268; 13 Am. Rep. 438; 38 N. J. L. 496; 20 Am. Rep. 425; *Bridge v. Wayne*, 1 Stark. 504. Nor will inspection by the buyer before acceptance deprive him of the protection of the warranty as to latent defects: Miller on Conditional Sales, 87, 94; Biddle on Warranty, secs. 111, 141; *Meckley v. Parsons*, 66 Iowa, 63; 55 Am. Rep. 261; *Jones v. George*, 61 Tex. 345; 48 Am. Rep. 280; *Gould v. Stein*, 149 Mass. 570; 14 Am. St. Rep. 455. Whether *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639, and *Barnard v. Kellogg*, 10 Wall. 383, are consistent with this rule we need not inquire, since we are quite certain that the rule prevails in Georgia, however it may be in some other states: *Atkins v. Cobb*, 56 Ga. 86.

2. Three of the car-loads of corn inspected, accepted, and paid for were, as the evidence pretty clearly shows, "false packed." Upon the surface, the corn was sound, and came up to the description; but beneath, beginning at a depth of some two feet, the corn was musty and "blue-eyed." The inspection

actually made penetrated the mass a foot or more below the surface, and the defective corn was not discovered; and it does not appear that the inspection which ought to have been made was different from that which was in fact made. This being so, the musty and "blue-eyed" corn packed beneath that which was sound should be classed, with reference to the whole car-load, as a latent defect. The difference between patent and latent is, that one is open to observation by ordinary inspection, and the other is not.

3. It was not competent to vary the general law of the state, raising a warranty in favor of the purchasers, by showing a local usage in Augusta, operating upon the corn trade, to the effect that the acceptance of corn in bulk, and paying for it after inspection, were considered as waiving or releasing all claim upon the seller to answer for any defects of quality. Doubtless the custom is binding upon those who have recognized it in their own transactions, and thus adopted it for their own dealings; but persons who have not done so are entitled to stand upon the general law: *Jones on Commercial Contracts*, secs. 122, 123; *Hatcher v. Comer*, 73 Ga. 418; *Thompson v. Ashton*, 14 John. 316; *Barnard v. Kellogg*, 10 Wall. 383; *Yates v. Pim*, 6 Taunt. 446. A vigorous and learned opinion to the contrary was delivered in *Snowden v. Warder*, 3 Rawle, 101, in which case Chief Justice Gibson dissented.

4. A defect of quality in the three car-loads of corn did not, under the circumstances, entitle the purchasers to reject the ten car-loads subsequently tendered, and found, upon inspection, to come up to the terms of the contract. The whole purchase embraced thirty car-loads, to be delivered in Augusta by installments, and these ten were a part of the thirty. Neither before nor after the defect was discovered in the three car-loads was there any intention on the part of the buyers or the sellers to abandon or rescind the contract. On the contrary, even after the ten car-loads were rejected, both parties went forward in the performance of the contract, and its full performance on both sides seems to have been completed. The right to rescind was neither claimed nor exercised as to any part of the contract. The subject will be found discussed with more or less breadth in the following authorities: *Leake on Contracts*, 654, 655; 2 *Benjamin on Sales*, 787, note 26; *Norrington v. Wright*, 115 U. S. 188; 21 *Am. Law Reg.* 398, notes; *Cahen v. Platt*, 69 N. Y. 348; 25 *Am. Rep.* 203; notes to *Gill v. Benjamin*, 54 *Am. Rep.* 624; *Blackburn v.*

Reilly, 47 N. J. L. 290; 54 Am. Rep. 159; *Myer v. Wheeler*, 65 Iowa, 390; *Mersey etc. v. Naylor*, L. R. 9 App. C. 434; and see *Georgia Refining Co. v. Augusta Oil Co.*, 74 Ga. 497. In the present case, there was no fraud on the part of the sellers. The false packing was not their work, nor was it known to them. They had purchased the corn as they sold it, packed in the same cars.

5. With the law properly applied to the evidence in this case, as we understand it, the plaintiffs in error are entitled to recover, for the breach of warranty, their damages, properly measured, for the defect in quality of the damaged corn in the three cars which they accepted and paid for; and the defendants in error (the plaintiffs below) are entitled to recover their damages, properly measured, for the refusal of the purchasers to accept the ten cars of corn which ought to have been accepted, but were rejected without good cause. Which-ever party has the largest claim on this basis should prevail when the case is tried again, unless the evidence should be materially different from that which is now in the record before us.

6. When the broker who sold the ten cars was under cross-examination, it was competent to ask him not only to disclose the amount of his commissions, but whether they had been paid or not. These commissions were sued for in the action which was on trial, and though they could be recovered if there was a real liability to pay them incurred by the plaintiffs below, the payment or non-payment might throw light upon whether that liability was absolute or dependent upon a recovery in this case. If the witness, as broker, had an interest in the recovery, that would go to his credit. At all events, he was under cross-examination, and the right to sift is very broad: 1 Thompson on Trials, secs. 406 et seq.

The court erred in not granting a new trial.

Judgment reversed.

SALE — WARRANTY. — No form of words is necessary to constitute an express warranty in the sale of chattels: *Kircher v. Conrad*, 9 Mont. 191; 18 Am. St. Rep. 731; *Hexter v. Bast*, 125 Pa. St. 52; 11 Am. St. Rep. 874, and note. The sale of a chattel by a particular description is a warranty that the article sold is of the kind specified: *Fairbank C. Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753. A sale of a number of "bales of Ceara scrap-rubber, as per samples of second quality," imports a warranty that the goods furnished will be like the samples, and of the quality designated: *Gould v. Stein*, 149 Mass. 570; 14 Am. St. Rep. 455. A sale by vendors of "all the horn chains they manufacture" was construed to mean that they would fur-

nish to vendee the articles known in the market as "horn chains," and that they should be of good workmanship, and of a fair, merchantable quality: *Sweat v. Shumway*, 102 Mass. 365; 3 Am. Rep. 471. In a contract for the sale of hams described as "choice sugar-cured canvased hams," the words used import a warranty both as to the kind and quality of hams to be furnished: *Forcheimer v. Stewart*, 65 Iowa, 594; 54 Am. Rep. 30; compare *Ryan v. Ulmer*, 108 Pa. St. 332; 56 Am. Rep. 210. A sale of a quantity of cotton in bales, "to be of the average grade of middling," constitutes a sale with a warranty that the cotton shall be of the variety and quality designated: *Love v. Miller*, 104 N. C. 582.

SALES — CAVEAT EMPTOR. — Effect of the buyer's want of the means of information or opportunity for inspection: Note to *Barnard v. Duncan*, 90 Am. Dec. 427, 428. In *Love v. Miller*, 104 N. C. 582, where M. contracted to sell to L. a quantity of cotton in bales, "to be of the average grade of middling," etc., it was held that the fact that the buyer had an opportunity to inspect the cotton, and did inspect some of it at the time of its delivery, did not, in view of the peculiar character of the article, amount to a waiver of the warranty imported by the words of the contract of sale.

SALES — LATENT DEFECTS. — A buyer, discovering a latent defect in an article bought by sample, for a particular purpose, after the article has been delivered, may return it to the vendor: *Hudson v. Roos*, 77 Mich. 363; but he must act with promptness: *Farrington v. Smith*, 77 Mich. 550.

COSKERY v. NAGLE.

[83 GEORGIA, 696.]

INNKEEPER'S LIABILITY FOR ACTS OF HIS PORTER. — If the porter of a hotel receives, at a railway depot, checks for the baggage of a traveler who intends to and does become the guest of the hotel, its proprietor cannot escape liability on showing that the duties of the porter were restricted to advertising the hotel and suggesting it to strangers, unless he can also show that the guest was aware of such restriction.

INNKEEPER BECOMES RESPONSIBLE FOR HIS GUEST'S BAGGAGE FROM THE MOMENT THE TRAVELER CONVEYS IT TO THE HANDS OF A PORTER of the hotel, though the latter, in the presence of the guest, confides the check for the baggage to a transportation company to be taken to the hotel, and it never reaches there, if the guest did not know that the person to whom the porter delivered the check was not a representative of the hotel.

INNKEEPER EMPLOYING A TRANSPORTATION COMPANY TO FURNISH AN OMNIBUS AND WAGON to receive guests of the hotel at a railway depot, and to transport them and their baggage to the hotel, is liable if the baggage of a guest delivered to such company is by it lost before reaching the hotel.

INNKEEPER, LIABILITY TO GUEST, WHEN COMMENCES. — When a traveler arrives at a depot and is met by one who is the porter of an inn, who indicates to the traveler a certain conveyance in which he can go to such inn, and the traveler delivers to him his baggage, or the check therefor, the traveler becomes thereby a guest of such inn so far as to render the proprietor thereof liable for the safe-keeping or redelivery of the bag-

gage; the liability of the proprietor commences from the time of the delivery of the baggage or check to the porter. Any private arrangement between the landlord and the carrier for the transportation of persons and baggage to his house does not affect the traveler, who has the right to assume, without any knowledge to the contrary, that such carrier is in fact authorized by the proprietor of the house to safely and securely transport himself and his baggage; and when a loss occurs by the negligence of such carrier, the proprietor of the house is liable to the traveler.

W. K. Miller, for the plaintiff in error.

W. H. Fleming, for the defendant in error.

BLANDFORD, J. The plaintiff was met at the depot by a porter of the hotel, who wore a cap with the name of the hotel on it, and who cried the name of the hotel, and he was shown by this porter to the omnibus which was to take him to the hotel. He delivered to the porter the check for his baggage, telling him that he was anxious to have it promptly, to which the porter replied that it would come right along in another wagon. The porter, in the presence of the plaintiff, gave the check to another man, who, according to the plaintiff's testimony, he "did not know was any other than an *attaché* of the hotel." The plaintiff had stopped at the same hotel about a week before, at which time this porter was connected with the hotel in the same way, and when he intrusted his check to him on this occasion, he recognized him as the same porter who on the former occasion had performed similar services for him. The plaintiff did not know that the omnibus or the wagon which brought the baggage was run by another person than the proprietor of the hotel, and when he paid his fare on the former occasion, supposed he was paying it to the hotel. The omnibus was the usual mode of conveyance from the depot to the hotel, the proprietor of the hotel having agreed with the transfer company for the omnibus and wagon to run to the hotel, and one of the omnibuses had the name of the hotel on it. He was taken to the hotel and received as a guest. The valise was not delivered at the hotel. It was delivered by the railroad company to the holder of the check, and there was no further trace of it. The plaintiff demanded it of the hotel proprietor, and was then told by him that the transfer company was liable. He brought suit against the hotel proprietor for the value of his valise and its contents, and a verdict for the full amount was rendered in his favor.

An innkeeper is bound to extraordinary diligence in pre-

serving the property of his guests intrusted to his care: Code, sec. 2117. It need not be so intrusted by actual delivery: Code, sec. 2118. In case of loss, the presumption is want of proper diligence in the landlord. Negligence or default of the guest himself, of which the loss is a consequence, is a sufficient defense: Code, sec. 2120. It has been held by this court that "where a hotel-keeper sends his porter to the cars to receive the baggage of persons traveling, and baggage is delivered to the porter, and the traveler becomes the guest of the hotel, the liability of the innkeeper, as such, for the baggage begins on the delivery to the porter, and continues until redelivery to the actual custody of the guest": *Sasseen v. Clark*, 37 Ga. 242.

The innkeeper (who is the plaintiff in error here) seeks to escape the effect of this decision by evidence that the porter in the present case was not authorized to receive baggage, checks for baggage, or guests at the depot, his duty being simply to advertise the hotel and suggest it to strangers. We do not think that this makes any difference in the present case, it not being shown that the plaintiff knew of any such limitation upon the porter's authority. He simply knew that he was the porter of the hotel, — a servant whose duty ordinarily, as the name implies, is to carry parcels and luggage. "Where the innkeeper sends his carriage-driver or porter to the railroad station to solicit custom, he may become responsible for his guest's baggage from the moment the traveler confides it to the driver's or the porter's hands": Schouler on Bailments, 269, citing *Sasseen v. Clark*, 37 Ga. 242; *Dickinson v. Winchester*, 4 Cush. 114; 50 Am. Dec. 760. In the latter case, the doctrine of *respondeat superior*, which is invoked by the defendant here, is discussed by Shaw, C. J., and the distinction made that while the innkeeper, who had employed the conveyance of another to meet at the cars and carry to his hotel passengers who should choose to come there, might not be liable if the carriage-driver had negligently run over somebody in the street, yet he would be liable for the negligent loss of a traveler's baggage by the carriage-driver, where travelers were directed by him, in his own interest, to such conveyance; and he would be estopped to deny that the person thus actually employed was his agent for that purpose.

"The usages of travel, together with the vast variety of goods, parcels, and baggage which are customarily carried by travelers, are to be considered in determining what circum-

stances will charge the innkeeper with the care of property coming to his hotel. Horses and carriages are properly intrusted to the hostler, and parcels, to the agent or servant accustomed to receive them": Edwards on Bailments, sec. 460.

The defendant insisted that the plaintiff was negligent in having failed to call the porter's attention to the fact that his valise contained valuable jewelry and clothing; and in support of this position we are cited to the case of *Fowler v. Dorton*, 24 Barb. 384. On examination, it does not seem to help the plaintiff in error on this point, and seems to be against him in another respect. The plaintiff in that case, on alighting from the train at the depot, gave the check for his valise to one Blake, with a request to get his valise. Blake was an employee of the stage line, which had its office in the hotel, and he boarded at the hotel, and with the knowledge of the proprietor, had been in the habit of soliciting custom for the house. Blake got the valise, returned and set it down, and went off and left it, in order to attend to his duties with the stage company. The plaintiff, who saw him approaching with the valise, but did not see him set it down, went on his way to the defendant's hotel, where he was received as a guest. He had said nothing to Blake evincing an intention to become the defendant's guest, but simply handed him the check and told him to get the valise. In discussing the plaintiff's diligence, the court says "he was not bound to disclose the fact that the valise contained money." The court adds: "If he thought fit to intrust a man in the situation of Blake with so valuable an article, it would seem but a reasonable exercise of prudence that he should at least request him to deliver it to the hotel without delay." The evidence shows that this was done in the present case. As to the authority of Blake as agent of the hotel, the court below in that case charged that "if Blake was in the actual employment of the defendants, or, if not in their actual employment, was acting with the knowledge and approbation of the defendants, in such a manner as to induce the guests of the defendants to believe that he was their servant, they were liable for his acts, and the baggage received by him of the plaintiff was within the custody of the defendant as an innkeeper." The only criticism the court made upon this charge was, that "the judge should have gone further, and submitted to the jury the distinct question whether he received the baggage as the servant of the defendants, which fact, as the charge stands, seems to have been

assumed; but there is no exception to the charge, and this defect is not available to the defendant."

An English case which seems in point is the following: *Bather v. Day*, 8 L. T. 205 (1863). The plaintiff arrived at the defendant's inn with a mare and gig, which were taken to a stable-yard some distance from the inn, where it was customary to take horses and vehicles of guests. One Rowles, who acted as hostler for the guests, kept this stable, and was an independent livery-stable keeper, doing business with the public generally, besides the guests of the inn. He received no wages from the inn, and did not reside there. While the plaintiff was temporarily away from the inn, but while the horse was still in the stable, the stable-keeper negligently injured the horse. The plaintiff sued the innkeeper, and the innkeeper contended that the rule of master and servant did not apply so as to make her responsible, the stables not being hers, but the stable-keeper's. The court gave judgment against the innkeeper, and the court of exchequer, on appeal, affirmed the judgment, holding that while as between the stable-keeper and the innkeeper the stables were not under the innkeeper's control, yet as between the innkeeper and the plaintiff, they were the stables of the inn, and the stable-man the hostler of the inn. The court said: "We cannot enter into the private arrangement between the keeper and the person acting as her 'master of the horse.' It is the apparent relation, and not the private one, with which we have to deal. The respondent was a guest, and the horse was 'taken around to the stables in the usual way,' " etc.

The liability of an innkeeper, at common law and in this state, is that of an insurer. We know that this is a harsh rule, but it seems to have been the policy of the law of England — which was adopted by this state — to hold landlords and proprietors of inns or hotels, or houses kept for the accommodation of transient guests, wayfarers, and travelers, to the utmost responsibility and liability for the baggage and goods of such persons, intrusted to their care. When a traveler arrives at a depot, and is met by one who is the porter of an inn, hotel, or house kept for the purpose above stated, who indicates to the traveler a certain conveyance by which he can go to such place or not, and the traveler delivers to him his baggage, or the check therefor, the traveler is thereby a guest of such inn, hotel, or house so far as to render the proprietor thereof liable for the safe-keeping or redelivery of the same; the liability

of the proprietor commences from the time of the delivery of the baggage or check to the porter. All that the traveler must do is to assure himself that the person representing himself as such porter is in fact the porter of the house. Any private arrangement between the landlord and a carrier for the transportation of persons and baggage to his house does not affect the traveler, who has the right to assume, without any knowledge to the contrary, that such carrier is in fact authorized by the proprietor of the house to safely and securely transport himself and his baggage; and when loss occurs by the negligence of such carrier, the proprietor of the house is liable to the traveler.

And this rule is founded, not upon the fact that the law gives to the landlord or proprietor of the house a lien upon the baggage or goods committed to his care, but upon the policy of the law that such should be the liability of the proprietor. In this case there never could have been any lien of the landlord upon the baggage at the time the loss occurred, but the liability of the landlord was the same, notwithstanding no such lien existed. The lien of the landlord grows out of the indebtedness of the guest for his board during his stay at the house. These views, we think, are sufficiently sustained by the authorities above referred to.

The exceptions which have been taken by the plaintiff in error to the charge of the court and refusals to charge, in our opinion, are immaterial under the facts of this case. The verdict was demanded by the evidence and the law, and the judgment is affirmed.

THE PROVISIONS OF THE CODE OF GEORGIA, referred to in the opinion, declare that an innkeeper is bound to extraordinary diligence in preserving the property of his guests intrusted to his care, and is liable if it is stolen, when the guest has complied with all reasonable rules of the inn: Sec. 2117; that it is not necessary to show actual delivery to the innkeeper. Depositing goods in a public room set apart for such articles, or leaving them in the room of the guest, or placing a horse in a stable, is a delivery to the innkeeper: Sec. 2118; and that in case of loss, the presumption is want of proper diligence in the landlord: Sec. 2120.

In the case of *Sasseen v. Clark*, 37 Ga. 242, referred to in the principal case, the baggage of plaintiff was delivered to defendant's porter at the railway depot in Atlanta, and was taken to the hotel. The next morning, when the guests left the hotel, only six out of their eight trunks were brought by the porter to the depot; but he said that the other two had been left behind, and that he would return to the hotel, get the trunks, have them checked, and bring the checks. He did not do so, and the baggage was lost.

The witness who testified in behalf of the innkeeper stated that the bag-

gage was brought to the inn in wagons not in the employment of the house; that it was not counted when it came in, nor when taken out the next morning by one of the porters of the hotel; that the baggage was near the room occupied by the guest, and there was no chance for it to be removed without the knowledge of the witness, who was the clerk of the innkeeper; that no complaint was made of the loss of any baggage by the guest before leaving the hotel.

There was a verdict and judgment in favor of the plaintiff, and the appellate court, on appeal, in considering the question of the termination of the liability of an innkeeper for the goods of his guest, said:—

“The beginning and the termination of the liability of an innkeeper for goods of his guests must depend upon circumstances. The common usage of the country must have great weight in all such cases: *Story on Bailments*, sec. 478. Where the goods are delivered at the usual places for such goods at the inn, the innkeeper is chargeable with them, although not strictly within the inn: *Story on Bailments*, sec. 480. It matters not where the goods are deposited, provided they are placed in the custody of the innkeeper: *Edwards on Bailments*, 405. The responsibility of the innkeeper begins from the moment he receives the guest, with his goods, and it ends when the relation between him and the guest is dissolved. The privileges and responsibilities of the innholder are reciprocal and dependent upon each other, as a duty upon a right. For this liability he has a lien on the goods intrusted to him. Where he has no lien, he is not liable as an innkeeper; and he has a lien only where the property has been delivered to him by a traveler or guest: *Edwards on Bailments*, 407. The liability of the innkeeper for the goods of his guests intrusted to his care or to the care of his servants begins from the time the goods are intrusted, and at the place where the innkeeper usually takes charge of the baggage of his guests. At our railroad depots the innkeepers very often have their servants, usually called porters, for the purpose of taking charge of the goods of travelers, in order to induce them to become guests of the hotel. A traveler delivers his trunk or other personal property to one of these servants, to be taken to the hotel, he thereby impliedly contracts to become a guest of the hotel to which the servant is attached; and if he comply with such implied contract, the liability of the hotel-keeper for the care of the goods begins from the time of the delivery to his servant, and that liability continues until the goods be again delivered to the actual custody and control of the guest. And if the servant of the innkeeper take charge of the baggage, goods, etc., at the hotel, to deliver at the cars, for the guest, such liability continues until such delivery: See *Richards v. London etc. R. R. Co.*, 7 *Man. & G.* 839; 62 *Eng. Com. L.* 837. When the proof once shows the innkeeper in possession of and liable for the baggage of his guest, it devolves on him to show such facts as will discharge him from liability. If the custom be to deliver at the cars, or if he undertakes to do so, the proof should show a compliance with such undertaking.”

DRYSDALE v. STATE.

[83 GEORGIA, 744.]

CRIMINAL LAW — SELF-DEFENSE AGAINST VENGEANCE OF HUSBAND. — Adulterer caught in or immediately after an act of adultery by his paramour's husband should seek safety in flight, and if the husband should attack him, he has no right to stand his ground or cut to repel the husband's attack upon him, though it may be a dangerous attack.

W. T. Gary and R. L. Pierce, for the plaintiff in error.

Boykin Wright, solicitor-general, for the state.

BLECKLEY, C. J. 1. If the evidence of the prosecutor was true, there can be no possible doubt of the correctness of the verdict; and that the jury believed it true is equally certain, from the fact that they rendered a verdict based upon it. This disposes of the case upon its actual merits. None of the errors of the court complained of could have misled the jury if the prosecutor was a truthful witness; and with or without errors, the jury could not have reached a verdict of guilty had they doubted the truth of his testimony.

2. The charge of the court complained of in the sixth ground of the motion for a new trial must be read in the light of that testimony, this charge being: "If you believe the prosecutor caught the defendant and his wife under such circumstances as led him to believe that they had just been in the act of cohabitation or were about to cohabit with each other, then the prosecutor had the right to protect his marital rights; and if, in pursuance of such an object, he assaulted the defendant, and the defendant shot at him, with the intention to kill him, then the defendant is guilty of assault with intent to murder." There was no evidence, save that of the prosecutor, which tended to show that the defendant and the prosecutor's wife were caught under circumstances calculated to induce the belief that they had just been in the act of cohabitation or were about to cohabit. If such circumstances existed, they were undoubtedly brought about either by the guilty acts of the defendant, or by acts on his part done without just cause or excuse, and which were adapted to produce the belief that he was engaged at that time either in terminating or in beginning criminal communication with the prosecutor's wife. The charge of the court has no reference to any cohabitation except such as may have just taken place or such as was about to take place at the time of the hostile

meeting; and we take the law of such a situation to be this: that a man surprised by the husband immediately after an actual or immediately before an intended adulterous connection can lawfully defend himself against the husband's violence by flight only, or at least by means short of deadly. He cannot stand his ground and shoot or cut to repel the husband's attack upon him, though it may be a dangerous attack. Whatsoever the law would justify the husband in doing under such circumstances, it would not justify the adulterer in preventing, by homicide or attempting homicide; perhaps not otherwise than by making his escape. The charge we have quoted, treated as a general proposition, is inaccurate, because circumstances which would lead a husband to believe that a man has just been engaged in the guilty act, or is about to engage in it, would not deprive the man of the right of self-defense on the spot, unless he himself was chargeable with giving rise to such circumstances by his own improper or unjustifiable conduct. This qualification should have been introduced into the charge; but its absence in this particular case was harmless, inasmuch as the evidence on which the jury must have based their verdict showed that it was the improper and unjustifiable conduct of the accused at the time and place of the collision which brought the circumstances of apparent criminality into existence. Moreover, the verdict was not for assault with intent to murder, but only for unlawful shooting.

The other grounds of the motion for a new trial need not be discussed, inasmuch as none of them are sufficient, under the evidence in the record, to warrant the grant of another trial. As we have already said, the credibility of the prosecutor was the question on which the propriety of conviction depended, and on that question the sagacity of the jury can be fully trusted.

Judgment affirmed.

CRIMINAL LAW — ADULTERY OF WIFE. — Where a husband discovers his wife in the act of adultery, and strikes her with intent to kill, the killing will be murder: *Shufflin v. People*, 62 N. Y. 229; 20 Am. Rep. 483; but it is manslaughter merely for a husband to kill, on the spot, one taken in the act of adultery with his wife: *State v. Samuel*, 3 Jones, 74; 64 Am. Dec. 596, and note; compare *Price v. State*, 18 Tex. App. 474; 51 Am. Rep. 322, and particularly note 328-330. Adultery being only a misdemeanor, one who, being caught by a husband in adultery with his wife, resists an attack made upon him by the husband, and kills him to save his life, is guilty of manslaughter, not murder: *Reed v. State*, 11 Tex. App. 509; 40 Am. Rep. 795.

PHINIZY v. MURRAY.

[88 GEORGIA, 747.]

CORPORATION. — PURCHASER OF STOCK OF A CORPORATION, UPON WHICH, BEFORE ITS DELIVERY, A DIVIDEND IS DECLARED, has no right to refuse to pay for the stock until the seller gives him an order on the corporation for the payment of such dividend. If by law he is entitled to the dividend, such an order is unnecessary, and he has no right to exact it. By insisting upon the order, and refusing to make payment without it, the purchaser rescinds the contract, and loses his right both to the stock and to the dividend.

CORPORATIONS — DIVIDEND, TO WHOM BELONGS. — If, after a contract is made for the sale of shares of stock, but before the time appointed for paying therefor, a dividend is declared, the purchaser is entitled thereto on complying with his contract to purchase.

J. B. Cumming and Bryan Cumming, for the plaintiff.

Foster and Lamar, and T. E. Watson, for the defendant.

BLECKLEY, C. J. The contract, as alleged in the declaration, was, that on the 27th of November, 1886, the defendant agreed to sell to the plaintiff fifty shares of the capital stock of the Georgia Railroad and Banking Company at the price of \$120 per share, and to deliver the same as soon as the defendant could come to the city of Augusta and make delivery of the certificate or certificates and execute a power of attorney to transfer the same. The breach alleged is, that on the 4th of December, 1886, the defendant refused to deliver the shares, though requested by the plaintiff to do so, notwithstanding the plaintiff offered and was ready to pay the price agreed on.

The evidence shows that on the 1st of December a dividend of four dollars per share was declared by the corporation, and that on the 3d of December the defendant went to Augusta, and there offered to execute the required papers for transferring the shares according to contract. But the plaintiff's brokers refused to pay for the stock and consummate the transaction, unless the defendant would also execute an order for the dividend. The defendant refused to execute this order, claiming that the dividend belonged to him.

Let it be conceded that the contract to sell was completed by what transpired previously to the time that the dividend was declared, and let it also be conceded that, as an incident thereto, the plaintiff was entitled to the dividend, as would appear to be the case from the authorities cited below. Still, the broker, as representing the plaintiff, had no right to make the settlement of the claim to the dividend a condition of

receiving the stock and paying for it. The defendant had not collected the dividend, as was done by the seller in *Currie v. White*, 45 N. Y. 822. And if a right to it passed to the plaintiff as an incident of his purchase of the stock, the plaintiff could have collected it from the corporation without an order from the defendant, either in his own name or by using the defendant's name as holder of the formal, legal title for his, the plaintiff's, use. By giving timely notice to the corporation, any right, legal or equitable, which he had in the dividend, might have been protected: *Conant v. Seneca Co. Bank*, 1 Ohio St. 298.

The broker, as representing the plaintiff, had no right to exact the execution of a document not contemplated by either of the parties at the time the contract was entered into as a condition of payment for the stock, inasmuch as transfer and payment were to be concurrent acts. He could very well claim, as he did, that the dividend belonged to the plaintiff; but he could not make the settlement of a dispute on that question a condition of completing the transaction, the completion of which was necessary to perfect the incidental right which he claimed.

The defendant was no party to the declaring of the dividend, and the act of the corporation in declaring it cast upon him no duty to execute a paper in carrying out or completing the contract of sale which he had made with the plaintiff, through the broker, that he had not expressly or impliedly undertaken to execute when the contract was entered into. By endeavoring to introduce this new term into the contract, and by standing upon it as a condition of his own performance, he lost any right, not only to the dividend, but to the stock, which he would otherwise have had. He virtually rescinded the contract by electing not to comply with it.

The verdict was right in its effect, whatever errors may have been committed upon trial. The following authorities tend to show that had the plaintiff complied on his part with the terms of the contract, and assuming that the contract had no infirmity by reason of the double agency of the broker, his right to the dividend would have resulted as a legal incident: *Black v. Homersham*, L. R. 4 Ex. 24; *Harris v. Stevens*, 7 N. H. 454; *Morawetz on Private Corporations*, secs. 174-178; 2 *Addison on Contracts*, sec. 661; *Cook on Stock and Stockholders*, sec. 543.

Judgment affirmed.

CORPORATIONS — DIVIDENDS, TO WHOM BELONG. — Dividends belong to the owner of the stock at the time they are declared, although they are made payable at a future date: *Hopper v. Sage*, 112 N. Y. 530; 8 Am. St. Rep. 771. Where L. contracted before July 3d to sell shares of stock to B. at B.'s option, to be accepted by July 16th, on which day the stock was actually transferred to B., it was decided that a dividend upon such stock, declared on July 3d, belonged to L., although it was not to be paid until August 1st: *Bright v. Lord*, 51 Ind. 272; 19 Am. Rep. 732. But in *Burroughs v. North Carolina R. R. Co.*, 67 N. C. 376, 12 Am. Rep. 611, it is decided that a sale of shares of stock carries with it dividends that are declared thereupon, provided they are to be paid at a day subsequent to the transfer of the stock.

SEALS v. PIERCE, LITTLE, & Co.

[83 GEORGIA, 787.]

CONVEYANCE OTHERWISE PERFECT IN FORM IS NOT CONVERTED INTO A WILL by inserting in it a clause declaring that it is to go into effect after the death of the grantor, and that he claims the right to hold the land so long as he lives.

THE question in this case was, whether an instrument executed by Nancy Copelan to H. V. Seals was a conveyance or was testamentary in its character. The instrument in question was in the form of an ordinary warranty deed, except that immediately following the description is the following clause: "This deed is to go into effect after the death of said Nancy Copelan, of the first part, she claiming her right to hold the land so long as she lives, and at her death, then at her death all the franchises and right which she hold to be to the party of the second part, to be by her willed or conveyed as the party of the second part may elect." The trial judge held that the instrument was a conveyance.

R. H. Lewis, for the plaintiff in error.

J. A. Harley, for the defendant in error.

SIMMONS, J. The only question made in this case is, whether the paper set out in the record is a will or a deed. It is conceded on both sides that if it is a will, the property is not subject to the execution, and if it is a deed, it is subject. The court below held that it was a deed, and put his decision upon the case of *White v. Hopkins*, 80 Ga. 154. We agree with the court below that the case at bar is ruled by that case.

Judgment affirmed.

THE PRINCIPAL CASE is not only determined upon the authority of *White v. Hopkins*, 80 Ga. 154, but the opinion is so brief that a reference to the latter case is essential for the determination of what was decided, and an exposition of grounds of the decision. The opinion of the court in that case, so far as addressed to the question involved in the principal case, was as follows: —

“The only question for us to determine in this case is, the proper construction of the paper offered in evidence by the defendant below, and ruled out by the court. It is a paper in the nature and form of a deed, made on the 11th of February, 1882, between Lemuel Hopkins, the intestate of the plaintiff in error, and Lewis Hopkins, both of Madison County; the consideration of the deed or paper being for the services of Lewis Hopkins, his wife and children, ‘in taking all necessary care of his person and dwelling-house, and doing his cooking, washing, and other necessary things to be done in house-keeping, taking care of the stock on the plantation, and carrying on the farm of said Lemuel Hopkins, and making all necessary repairs on the same.’ For these considerations, the deed recites that he has ‘granted, bargained, sold, aliened, conveyed, and confirmed unto the said Lewis Hopkins, his heirs and assigns, all that tract of land (107 acres, described in the instrument), to have and to hold the said bargained premises, with all the rights and appurtenances thereunto appertaining, to the only proper use, benefit, and behoof of the said Lewis Hopkins, his heirs, executors, administrators, and assigns, in fee-simple, subject to the before-mentioned services of the said Lewis Hopkins and his wife and children, and the title to the above-described tract of land to still remain in the said Lemuel Hopkins for and during his lifetime, and at his death to immediately vest in the said Lewis Hopkins in case he and his family faithfully perform their part of the contract; but in case the said Lewis Hopkins and his family and his wife and children fail to carry out their obligation, then and in that event title is not to vest in said Lewis Hopkins, but to remain in said Lemuel Hopkins and his heirs and assigns. And the said Lemuel Hopkins the said bargained premises unto the said Lewis Hopkins, his heirs, executors, and administrators, and against all and every person or persons, shall and will warrant and forever defend, by virtue of these presents.’

“Signed, sealed, and delivered in the presence of two witnesses, one of them a justice of the peace.

“1. The question is, Is this instrument a deed or a will? In order to determine that question, it is necessary for us to ascertain the intention of the maker, if we can do so, from the reading of the whole paper together. It is the duty of courts to construe instruments of this kind in such manner as to carry out the intention of the maker, if possible. The true test to determine whether the instrument is a deed or a will is, whether it is to take effect immediately, or to take effect only after the death of the maker. If it is to take effect after the death of the maker, it is a will; if it is to take effect immediately, or if it conveys a present estate, it is a deed. Taking this rule for our guidance, let us look at this instrument and determine from it whether it conveys a present estate and is to take effect immediately, or whether it is to take effect after the death of the maker.

“It is in the form of a deed; it commences as deeds ordinarily commence, — ‘This indenture,’ etc.; it recites a valuable consideration, the services of Lewis Hopkins, his wife and children, for and during the lifetime of the said Lemuel Hopkins, in taking care of his person, etc.; and for these services he recites that he has granted, bargained, sold, aliened, conveyed, and confirmed

unto the said Lewis Hopkins, and to have and to hold the said bargained premises, etc.; it then warrants the title to the land, and recites that it was signed, sealed, and delivered, and was witnessed and attested by two witnesses, one of them a justice of the peace. This, in our opinion, conveys an absolute title from the grantor to the grantee. It conveys a present interest in the land, and takes effect immediately. After it was executed it was irrevocable by the grantor. He would have had no legal right to sell the land to any other person, because the estate in the land passed out of him into the grantee when the paper was executed and delivered.

"But it was argued that the words, in the *habendum* clause, 'that the title to the above-described tract of land' should 'still remain in the said Lemuel Hopkins for and during his lifetime, and at his death immediately vest in the said Lewis Hopkins,' etc., shows that it was not to take effect until after his death. We do not agree with this construction. We think that the words used in the *habendum* clause are simply a reservation of a life estate in the grantor. He had already conveyed the title to the land to the grantee; and he could not pass the title into the grantee and reserve it in himself at the same time. It was competent for him to reserve a life estate in the land, and to retain possession of the same until his death. It was competent for him to convey an estate to the grantee upon a condition subsequent, to be defeated in the event that the condition was not complied with. These words make this instrument defeasible, subject to be defeated upon the failure of the grantee to perform his part of the contract. To give the paper this construction, the whole of the instrument will stand, and the intention of the grantor will thus be carried out. To construe it as a will, the intention of the grantor would be defeated, because it cannot be set up as a will, having only two witnesses.

"Upon this subject, and sustaining these views, see 3 Ga. 460; 4 Ga. 75; 6 Ga. 526; 15 Ga. 103; 60 Am. Dec. 682; 29 Ga. 677; 22 Ga. 472; 22 Ga. 462; 22 Ga. 491; 31 Ga. 720. In this last case the words of the deed were, 'do give, grant, and convey' certain property, 'to have and to hold after my death the aforesaid property.' It was held 'that in the first clause there was a clear gift *in presenti*, and that the words 'after my death,' in the *habendum*, may be construed as a postponement of possession and enjoyment of the property by the donees until after the donor's death, and a reservation of an estate in himself for his lifetime; and thus reconciled, it is a clear gift *in presenti*.'

"In 17 Ga. 234, the words were, 'bargained, sold, and conveyed, and by these presents do bargain, sell, and convey, to the said David, his heirs and assigns,' a certain negro girl, 'to be delivered to the said David at my death, and not before.' This was held 'to be, to all intents and purposes, a sale for a valuable consideration, the seller reserving to himself a life estate in the property.' See also 13 Ga. 515.

"2. If this position should be deemed untenable, we would still hold the instrument to be a deed, on the ground that these words in the *habendum* clause would be repugnant to the first part of the deed, or the granting clause. 'If two clauses in a deed be utterly inconsistent, the former must prevail': Code, sec. 2697. 'A condition repugnant to the estate granted is void': Code, sec. 2296. The condition inserted in the *habendum* clause of this deed, unless construed as above, is certainly inconsistent with the first part of the deed. The first part, as we have shown, clearly conveys the title and the present estate in the land to the grantee; and the attempt by the grantor, in a subsequent part of the deed, to retain the title in himself is

inconsistent with the first part of the deed, wherein he had already conveyed the title out of himself; and under the code, the former must prevail. 'If the *habendum* be repugnant to the premises, it shall be void; as, if a grant be of all his term *habendum* after his death, the *habendum* will be void': 4 Comyn's Digest, 392, tit. Grant, E, 10. 'And the grantee will take the estate given in the premises; a consequence of the rule that deeds shall be taken most strongly against the grantor, and therefore that he will not be allowed to contradict or retract, by a subsequent part of the deed, the gift made in the premises': 32 Ga. 589. Taking either view of the case, we hold that the instrument is a deed, and that the court did right in granting a new trial. Judgment affirmed."

SWIFT & Co. v. COKER.

[83 GEORGIA, 789.]

COTENANTS OF A RIGHT OF WAY. — If two or more persons are co-tenants of an alley which is subject to an agreement that it shall be used for no other purpose than as an alley for the mutual benefit of the owners of the property on each side thereof, one of them has no right to obstruct the alley by building a wooden frame across it, and putting up hooks and slides of metal to hang and slide beef and other meat on. Nor is the right of the other parties in interest to enjoin such use of the alley impaired by the fact that they are not damaged thereby. They are entitled to stand on their strict legal rights, whether they are damaged or not.

P. L. Mynatt, for the plaintiffs in error.

Hall and Hammond, for the defendants in error.

SIMMONS, J. The trial judge did not err in granting the injunction complained of in this case. Both of these parties held under deeds which stipulated and agreed that the land was to be used for no other purpose than as an alley, and that it was to be kept open and used as an alley for the mutual benefit of the owners of the property on each side of the alley. Under these covenants in the deeds, we do not think that the defendants had any right to obstruct the alley "by building a wooden frame entirely across the same, and putting up hooks and slides of metal to hang and slide beef and fresh meat on," as alleged in the complainants' petition. The obstruction seems to have been erected by upright posts attached to the walls on each side of the alley, and cross-beams running from one post to another, the whole length of the alley, and attached to these cross-beams was the slide, with hooks for the purpose of fastening the beef, so that it could be carried from one end of the alley to the other, and stored in the warehouse of the defendants.

While it is true that, under the law, one tenant in common has a right to use the whole property if he does not exclude his co-tenant, we think that, under the covenants in these deeds, this structure and slide were not the kind of use contemplated therein. If this had been an alley dedicated to the public, no one would contend that he had a right to erect a structure of this sort therein. While the alley under consideration is not a public alley, under the covenants in the deeds, we think the same principle of law as between the owners on each side thereof applies, and that it must be used only for the purposes mentioned in the deeds. One tenant in common has no more right to obstruct it, over the objections of the other tenants, than he would have to obstruct a public alley, over the objection of the town authorities. Nor do we think that the fact that the plaintiffs were not using the alley at the time the obstruction was erected, and therefore were not damaged by the obstruction, makes any difference in law. The plaintiffs are entitled to stand on their legal rights, whether they are damaged or not, and to object to the alley being diverted from the use for which it was originally intended, and which was stipulated in the deeds.

Judgment affirmed.

EASEMENT, OBSTRUCTION OF—INJUNCTION. — One who has acquired by grant or by prescription a right of way across the lands of another may enjoin an obstruction of or interference with his rights: *Rogerson v. Shepherd*, 33 W. Va. 307; *Herman v. Roberts*, 119 N. Y. 37.

GRAY v. CHURCH.

[84 GEORGIA, 125.]

PARTNERSHIP—ACCOUNTING BETWEEN FIRMS. — Where one who is a member of two firms sells the goods of one to the other as his own in payment of his pre-existing debt, each firm being ignorant of his connection with the other, a proper mode of accounting between them is to leave the interest of such party in the purchase price of the goods to stand as a credit on his account with the buying firm, while the remainder of the purchase-money is to be paid to the other members of the firm thus parting with the ownership of the goods.

W. H. Payne and R. J. McCamy, for the plaintiff in error.

R. M. W. Glenn, W. E. Mann, and McCutchen and Shumate, for the defendants in error.

BLECKLEY, C. J. Wilson, being a partner with Church and Brother in the ownership of certain cattle, sold the beef from the same to Gray & Co., of which firm he was a member. The other members of this firm did not know that he was connected with Church and Brother in the ownership of the beef, nor did Church and Brother know he was a member of the firm of Gray & Co. He was indebted to the purchasing firm at the time, and sold the beef to it as his own property, and as a payment upon his indebtedness. Delivery was made by Church and Brother to an agent of Gray & Co. whilst this ignorance on both sides existed, and credit was given to Wilson in his account on the partnership books of Gray & Co. for the value of the beef at four and one half cents per pound. The firm of Gray & Co. consisted of two members besides Wilson. One of these two having died, Church and Brother brought suit against the survivor, upon an account for the beef at five and one half cents per pound. Being still ignorant that Wilson was connected with Gray & Co., they joined him as a plaintiff in the action, describing him as a partner with themselves in the contract of sale. Afterwards, they amended their declaration by striking him as a party plaintiff, inserting him as a party defendant, and reducing their claim to one half of the account in suit. This amendment was not objected to, and a trial being had upon the declaration as amended, a verdict was rendered in favor of the plaintiffs for one half of the account. A new trial being refused this writ of error was brought.

1. Wilson, a common member of two firms, the one selling and the other buying, misapplied the assets of the former by applying them to his own debt due the latter. Of this misapplication the latter had notice through him. His knowledge was its knowledge. After the beef became the property of the purchasing firm, it was still his property as a partner in that firm; and his fraud certainly adhered to it in so far as his interest as a partner in that firm was concerned. Could the partnership, as such, acquire a pure title when the share in that title of one of the partners was tainted with moral fraud? We think not: *McClurken v. Byers*, 74 Pa. St. 405. True, he acted in equal bad faith towards his copartners in this firm by concealing the title of the selling firm, and disposing of the beef as his own, but this concealment deprived them of nothing, only the gain of collecting so much of a pre-existing debt due the partnership as half the value of the beef repre-

sented. They parted with neither money nor property in the transaction. The verdict rendered in this case leaves the interest of Wilson in the beef to stand as a credit on his account with Gray & Co. This, it seems to us, does full justice between the two partnerships on the principles of natural equity. We see not how a more righteous result could be reached, under all the circumstances. The case is one not within the range of ordinary legal remedies; only equitable relief could be afforded, and that has been administered by the finding of the jury. Had Wilson not been a member of the buying firm, then, according to some authorities, that firm would have acquired the full title for lack of notice of any interest of Church and Brother in the ownership; but even in that case, the weight of authority is perhaps the other way: 1 Lindley on Partnership, bottom of pages 272 et seq., notes; 1 Bates on Partnership, sec. 410; 2 Bates on Partnership, secs. 1037, 1046; *Wise v. Copley*, 36 Ga. 508; *McGhees v. McCutchen*, 82 Ga. 788; *Clarke v. Farrell*, 80 Ga. 622.

2. It was urged in the argument that the evidence showed that the market value of the beef was four and one half cents, not five and one half cents, per pound. This is probably true; but there was testimony that Wilson named the latter in reporting to Church and Brother, and that other beef had been settled for by Gray & Co. at this price. Moreover, the difference is one of only a few dollars in the aggregate of the recovery, and is too inconsiderable to require a new trial.

Judgment affirmed.

PARTNERSHIP. — One partner cannot use the firm property to pay off his individual debts: *Janney v. Springer*, 78 Iowa, 617; 16 Am. St. Rep. 460, and note; *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653; note to *Dob v. Halsey*, 8 Am. Dec. 297.

BLALOCK v. WALDRUP.

[84 GEORGIA, 145.]

DISQUALIFICATION OF JUDGE — RELATIONSHIP. — A justice of the peace, whose wife is a cousin of the wife of a party to the action, is not disqualified to sit therein on the ground of relationship. The justice and the party in such case are not related by affinity.

JURY AND JURORS — RIGHT TO CORRECT VERDICT. — Where the jury, by mistake, has rendered a verdict for defendant, and the mistake is immediately discovered, and attention called to it, the jury may retire and correct the verdict, so as to make it stand in favor of plaintiff, as was originally intended.

ACTION on a promissory note. Judgment for defendant, and plaintiff appealed.

A. W. Fite and A. S. Johnson, for the appellant.

J. A. Baker, for the respondent.

BLANDFORD, J. The question in this case is, whether a justice of the peace is disqualified from presiding in a case where one of the parties to the case married a cousin of the wife of the justice, the party and the justice not being otherwise related. It is insisted, on the part of the defendant in error, that the justice and the plaintiff in error are related within the fourth degree of affinity, under section 205 of the code, although it is admitted that they are not related within any degree of consanguinity.

1. A husband is related by affinity to the blood relations of his wife, and the wife by affinity to the blood relations of her husband, but not otherwise by affinity. Thus two persons who are not otherwise related may marry two sisters, and these persons would not be related by affinity to each other, as was held by the court in the case of *Deupree v. Deupree*, 45 Ga. 414. In the present case, the justice was not related in any respect to the party, and hence was competent to preside in the case. The party having married a cousin of the justice's wife was not thereby brought within any of the degrees of consanguinity or affinity. Had the party married the justice's cousin, or the justice married the party's cousin, he would have been disqualified. Nothing of that kind was done in this case. The two women, the wife of the party and the wife of the justice, were related by consanguinity; but this did not render either the justice or the party related in any degree whatever, they being merely the husbands of these cousins. The husband of the cousin, who was a party in this case, was related to the wife of the justice by affinity, but not to the justice; and while the justice may have been related by affinity to the wife of the party, he was not related by affinity to the party himself.

The court below sustained the *certiorari*, upon the ground that the justice was disqualified from presiding in this case. In this he committed manifest error.

2. Another ground taken in the petition for *certiorari* was, that the jury rendered a verdict in favor of the defendant for a certain sum of money, which was the sum claimed by the

plaintiff of the defendant; and when that verdict was returned, this mistake was immediately discovered, and the attention of the jury called to it, and they retired and corrected it, and instead of rendering a verdict for the defendant, they rendered it as they should have done, — for the plaintiff.

Judgment reversed.

JUDGE, DISQUALIFICATION OF. — As to the disqualification of a judge on account of his relationship to one of the parties to the suit, see note to *Moses v. Julian*, 84 Am. Dec. 127. A judge is not disqualified by affinity from hearing a cause in which his wife's sister's husband is a party: *Hume v. Commercial Bank*, 10 Lea, 1; 43 Am. Rep. 290. See also *Patterson v. Collier*, 75 Ga. 419; 58 Am. Rep. 472.

SIMS v. EAST AND WEST RAILROAD COMPANY.

[84 GEORGIA, 152.]

MASTER AND SERVANT — UNINSTRUCTED SERVANT ASSUMES ORDINARY RISKS OF HIS EMPLOYMENT. — For two persons of competent strength to load an open flat-car with lumber of uniform length, breadth, and thickness, by piling the same in parallel tiers one after another, is to do work which common laborers can perform without more hazard to their own security than appertains to ordinary manual labor. It requires no special skill nor antecedent training, and therefore a youth seventeen years of age, who engages in it as part of the business for which he was employed by the railway company, is not unduly exposed by reason merely of being left uninstructed in the mode of doing the work and unwarned beforehand of any danger attending it.

THE PLAINTIFF HAVING BEEN INJURED BY SOME OF THE LUMBER FALLING UPON HIM, and there being no evidence that the doing of such work properly was dangerous, or that he did not know how to do it properly, or that he was wanting in capacity to know, and nothing being alleged in the declaration as to any defect in the car or any of the appliances, the court was correct in granting a nonsuit.

ACTION to recover for personal injuries caused by the alleged negligence of the railroad company, by whom the plaintiff was employed. Judgment of nonsuit, and plaintiff appealed.

Baker and Heyward, for the appellant.

M. R. Stansell and I. F. Thompson, for the respondent.

BLECKLEY, C. J. The grounds of liability set out in the declaration are the failure of the company to warn Sims of the danger of the work assigned to him, and the omission to give him needful and proper instructions by which to perform it

safely. But there is no evidence that the work was in any respect more hazardous than that of ordinary labor, or that, if it was, he did not know how to do it safely. He was a witness, but said not a word going to show either that he was ignorant of any danger attending the work, or that he did not know how to perform it properly. Several other witnesses testified, among them his father, none of whom said that the work was dangerous or that Sims was too young or too ignorant to understand how it should be done. There is no evidence that he was lacking in common sense or in the ordinary capacity of a youth of seventeen years of age. The labor which he undertook was not one requiring the skill of an expert or the experience of a practiced hand or eye. It was such work as any common laborer of his age is capable of doing, just as much so as to plow or chop. It is manifest that the injury did not result from the hazardous nature of the work, but either from the failure of Sims to execute it with due care, or from some defect in the car; and if it resulted from either of these causes, there could be no recovery in the present action. For if it was his own carelessness in doing ordinary work suitable to his age that brought the calamity upon him, he must take the consequences; and if it was the defective condition of the car, that is not embraced in the declaration. To recover because a bad car was furnished upon which to do the work would be to recover for negligence in the company not alleged. The cause of action as set forth in the declaration not being proved, and there being no evidence from which the jury could infer by any process of right reasoning that it was proved, the court did not err in granting a nonsuit.

The question that the work was not, in its nature, attended with any extraordinary hazard or danger was settled when this case was here before: *East and West R. R. Co. v. Sims*, 80 Ga. 807. The evidence on that question was substantially the same then as now. The two head-notes prefixed to this opinion sum up the result.

Judgment affirmed.

MASTER AND SERVANT — ASSUMPTION OF RISKS BY SERVANT. — A servant assumes the risks ordinarily incident to his employment, but has a right to expect of the master that he will provide safe machinery, tools, etc., and unless the servant is instructed as to defects therein, he cannot be deemed to have assumed the risks arising therefrom, unless the danger is plainly apparent: *Rummel v. Dilworth*, 131 Pa. St. 509; 17 Am. St. Rep. 827, and note.

SLOAN v. PRICE.

[84 GEORGIA, 171.]

JUDGMENTS—RES JUDICATA—WAIVER OF EXEMPTION.—Where certain property is adjudged exempt from execution, and released, and other property, also exempt, is subsequently seized in another suit between the same parties for the payment of the same debt, a waiver of exemption may be set up to subject the latter property to the payment of the debt, although such waiver might have been and was not set up nor litigated in the first suit.

A. W. Fite and A. S. Johnson, for the plaintiff in error.

J. M. Neel, for the defendant in error.

BLECKLEY, C. J. The judgment from which the execution issued was rendered in April, 1885. A levy upon certain mules and a wagon was made on June 3d, thereafter. A claim to this property was interposed by Mrs. Sloan on June 24th. The *fieri facias* was amended, and the levy fell. It was, however, levied upon the same property on August 8, 1885. The claim previously interposed seems to have been considered as applicable to the new levy, and a trial was had upon it in September, 1885, the result of which was a judgment by the justice of the peace that the property levied upon was not subject. That ended all controversy, so far as the mules and wagon are concerned. In the November following, the same *fieri facias* was levied upon 1,630 pounds of seed-cotton. Mrs. Sloan interposed a claim to that, which was tried by a jury, and the cotton was found subject. Thereupon she brought a writ of *certiorari*, complaining that the finding was contrary to law and evidence. Upon the hearing, the court overruled the *certiorari*, and she excepted. Her claim rested upon proceedings before the ordinary, had by her as the wife of Sloan, the defendant in *fieri facias*, commenced whilst the first levy upon the mules and wagon was pending, and terminated by the approval of the ordinary on July 18, 1885. The exemption embraced the mules and wagon as well as the cotton, the latter being claimed as exempt whilst it was a growing crop. No question arises in the present case as to whether it could be claimed as exempt at that stage, but it may be well enough to refer to three cases on the subject, which are all that have been decided up to the present time, so far as we are aware. These cases are *Tift v. Newsom*, 44 Ga. 600; *Cox v. Cook*, 46 Ga. 301; *Clements v. Lee*, 47 Ga. 625. It is yet an open question whether a growing crop can be set

aside as personalty, upon a claim by a debtor or his wife as exempt property. Upon the trial of the second claim case, to wit, that involving the cotton, Mrs. Sloan introduced her exemption papers, and proved that she had introduced them upon the trial of the former claim,—that which involved the mules and wagon. Price, the plaintiff in *feri facias*, replied to them by introducing the note dated June 2, 1884, on which the judgment was founded, which note contained a waiver in the following terms: "And each of us, whether maker or indorser, hereby severally waives and renounces, for himself and family, any and all homestead or exemption rights he may have under and by virtue of the constitution or laws of the state of Georgia or the United States as against this note or any renewal thereof."

It further appeared that this note was not put in evidence on the trial of the former claim, and that its introduction upon the latter trial made the only difference there was in the evidence on the two trials. The claimant contends that as this note might have been introduced on the first trial, and was not, the judgment finding the mules and wagons exempt is conclusive not only that they are not subject to the *feri facias*, but that the cotton is not subject. This position, it is said, is supported by the case of *Johnson v. Lovelace*, 61 Ga. 62; but that case, properly understood, is no authority for the position. It holds that "if the record shows that the same matters might have been litigated in the former action, then the fact that they were actually decided in that former action may be proved by extrinsic evidence." Here the waiver of the exemption might have been litigated in the former claim, and if it had been, the judgment would have been conclusive upon that question on the trial of the latter claim; but the evidence shows that the question was not litigated in the trial of the first claim. Therefore it remained open and at large: *Freeman on Judgments*, sec. 253; *Cromwell v. County of Sac*, 94 U. S. 351; *Davis v. Brown*, 94 U. S. 423; *Russell v. Place*, 94 U. S. 606; *Howlett v. Tarte*, 10 Com. B., N. S., 813; notes to *Cromwell v. County of Sac*, 16 Am. Law Reg., N. S., 730. "One who brings an action upon one demand, or several connected demands, and attempts to support his whole case, will assuredly be barred by the judgment from suing again from the same demand or any one or all of the connected demands; and he will find no escape from the estoppel by offering to show that he might have introduced other evidence now avail-

able which would have produced a different result. But the evidence not used in the first action may be used in another suit upon a different demand, though that demand be of the same nature, and grow out of the same transaction as the one first sued upon": Bigelow on Estoppel, 130, 131.

There was no error in overruling the *certiorari*.

Judgment affirmed.

RES JUDICATA, WHAT DOES NOT CONSTITUTE. — When one pleads former adjudication, he must show by the record, or by evidence *aliunde* consistent therewith, that the cause of action in the subsequent suit was actually litigated, or might have been under the pleadings and issues of the former suit: *Haines v. Flinn*, 26 Neb. 380; 18 Am. St. Rep. 785; *Jones v. Vert*, 121 Ind. 140; 16 Am. St. Rep. 379; *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436, and note; *Fishburne v. Ferguson*, 85 Va. 321; *Solly v. Clayton*, 12 Col. 30. Parties to a suit are only concluded as to such matters as are of the essence of the cause, or so involved in the controversy as to render a decision of them decisive of the suit, or of a material part thereof: *Lorance v. Platt*, 67 Miss. 183; *Brungardt v. Leiker*, 42 Kan. 206; *Quick v. Brenner*, 129 Ind. 364; *Warfield v. Warfield*, 76 Iowa, 633; *Ocheltree v. Hill*, 77 Iowa, 721; *Boston B. Co. v. Brown*, 149 Mass. 422; *Woolsey v. Bohn*, 41 Minn. 235; *State v. Keokuk etc. R'y Co.*, 99 Mo. 31; *Kempner v. Comer*, 73 Tex. 196. The former judgment to estop the parties must have been based on the merits of the case; *Keokuk etc. R'y Co. v. Donnell*, 77 Iowa, 221; *Conn v. Bernheimer*, 67 Miss. 498; *State v. Jenkins*, 70 Md. 472. A defendant, having failed to set off a cross-demand in an action upon a note for unpaid purchase-money, is not precluded by the judgment rendered in that suit from availing himself of the benefit of such set-off in a subsequent action against him to enforce the vendor's lien: *Weaver v. Brown*, 87 Ala. 533. A judgment is not *res judicata*, when rendered against one who from want of interest cannot maintain the action, so as to preclude the real party in interest from subsequently bringing and maintaining the suit: *Moise v. Traynor*, 26 Neb. 594; and where parties to a suit have no interest in a portion of the decree rendered therein, they are not, in a subsequent action, bound by such portion of the decree: *Pierce v. Early*, 79 Iowa, 199. A judgment cannot operate as *res judicata* against one as to whom a proceeding has been dismissed before rendition of judgment: *Ryan v. Heenan*, 76 Iowa, 589; for only those who are parties at the time of judgment are bound thereby: *Chase v. Kaynor*, 78 Iowa, 449. For instances of what does not constitute *res judicata*, see note to *Hawk v. Evans*, 14 Am. St. Rep. 252; note to *Gayer v. Parker*, 8 Am. St. Rep. 230, 231.

CARR v. CITY OF CONYERS.

[84 GEORGIA, 287.]

CRIMINAL LAW—QUARRELING, CURSING, AND ACTING DISORDERLY—WHAT DOES NOT CONSTITUTE. — A party charged with quarreling, cursing, and acting otherwise disorderly, in violation of an ordinance, cannot be convicted, when it appears that the only disorderly conduct of which he was guilty was the use of words which, though vituperative and threatening, were not profane, and were spoken in an ordinary tone of voice to one who did not reply thereto. Such words, used by one alone, do not constitute a quarrel, nor are they cursing, when it is questionable if even the word "dam" was used.

CRIMINAL LAW.—JUDGMENT CONSIGNING PERSON TO WORK IN CHAIN-GANG for failure to pay a fine imposed for the violation of a city ordinance is void, unless expressly authorized by statute.

G. W. Gleaton, for the plaintiff in error.

J. C. Barton and J. R. Irwin, for the defendant in error.

BLECKLEY, C. J. 1. The charge on which Carr was tried by the mayor was for "quarreling, cursing, and acting otherwise disorderly." It may be assumed that the city had a valid ordinance embracing the matters of this charge, as nothing to the contrary is alleged in the petition for *certiorari*: *Phillips v. Atlanta*, 78 Ga. 773. The evidence upon which the mayor founded his judgment is correctly set out in the official report. Did that evidence establish the charge? It shows no disorderly conduct on the part of Carr otherwise than by the use of words. Did his vituperative and threatening words amount to quarreling? They were spoken in an ordinary tone. Jones, the person of whom they were spoken, and to whom they were addressed, made no reply. There was no altercation, dispute, brawl, or angry contest. It seems to us that it takes two to make a quarrel; that a quarrel cannot be *ex parte*. Certainly so, unless the speaker utters his words in a loud and angry tone. Even then his conduct would be better described as disorderly conduct by loud and angry speaking, than by denominating it quarreling. No doubt Carr attempted to raise a quarrel, but the attempt wholly failed. He took the initiative, but the other party declined to participate. So no quarrel ensued. Was it proved that he cursed? His words, as repeated by Jones, were, that he, Jones, had sworn a lie on him, and he could whip him in two minutes; that he told a lie on him in the mayor's court, and he could whip him in five minutes. As repeated by Smith, the marshal, they were, that Jones swore a lie on him,

and he would whip him if it took him ten years; that he swore a "dam" lie on him, or something to that effect, and he could whip him. The marshal seems not to be certain that the word "dam" was used, and Jones, who seems to testify without any doubt, makes no reference to any such word. We think the sounder conclusion in a criminal proceeding would be that the word was not used. So construing the evidence would only be giving the accused the benefit of the reasonable doubt which the mind ought to entertain on the question. What the evidence really shows is, not that the accused was quarreling, cursing, or acting otherwise disorderly, but that he violated section 4372 of the code, by using opprobrious or abusive language, tending to cause a breach of the peace. But of that offense the municipal court had no jurisdiction, nor was Carr charged before the mayor with its commission.

2. The judgment passed by the mayor was, that Carr pay a fine of ten dollars and costs, and upon failure to pay the same, that he work in the city chain-gang for twenty-five days, and then be discharged. So much of this judgment as sought to enforce the payment of the fine by consigning the accused to the chain-gang was unwarranted, there being in the charter of Conyers no express grant of power to enforce the payment of fines by such means: *Brieswick v. Brunswick*, 51 Ga. 639; 21 Am. Rep. 240; 1 Dillon on Municipal Corporations, sec. 353; Horr and Bemis on Municipal Police Ordinances, sec. 155. In *Cobb v. Dalton*, 53 Ga. 426, the power exercised was expressly conferred. True, the charter of Conyers (Acts of 1880-81, p. 373), besides authorizing the use of a city chain-gang, adopts section 786 of the code, and makes it applicable to that city.

But we think the words "the council shall have power to make and pass all needful orders, by-laws, ordinances, resolutions, rules, and regulations not contrary to the constitution and laws of this state, and to prescribe, impose, and enact reasonable fines, penalties, and imprisonments in the county jail, or the place of imprisonment in said incorporation, if there be one, for a term not exceeding thirty days, for the violation thereof," confer no power even to imprison for non-payment of a fine, much less to use the chain-gang as a consequence of such non-payment. The imprisonments authorized are to be for the violation of by-laws, ordinances, etc., and not to enforce fines for such violation. Should it be thought that,

by the terms of the terms of the mayor's sentence we are reviewing, the chain-gang is not used to collect a fine, but as an alternative punishment for the offense, we answer, that, according to the case, above cited, of *Brieswick v. Brunswick*, 51 Ga. 639, 21 Am. Rep. 240, such a construction of the mayor's sentence would be incorrect. Moreover, counsel for both parties cited us, in the argument, to a printed copy of the ordinances of the city of Conyers, from which it appears that alternative punishments are not provided for by these ordinances, or by any ordinance of the city applicable to this class of offenses. We think the judge erred in refusing to sanction the application for a *certiorari*.

Judgment reversed.

CRIMINAL LAW — CURSING. — Profane swearing in a public place and in the hearing of citizens, continued for five minutes, though only on a single occasion, is an indictable offense: *State v. Chrisp*, 85 N. C. 528; 39 Am. Rep. 713; *contra*, *Gaines v. State*, 7 Lea, 410; 40 Am. Rep. 64. To make profane swearing a nuisance, the profanity charged must be uttered in the hearing of divers persons: *State v. Pepper*, 68 N. C. 259; 12 Am. Rep. 637.

MUNICIPAL CORPORATION, POWER OF, TO ENFORCE ORDINANCE. — A city has no power to punish disobedience of its ordinances by fine, imprisonment, or other penalty, unless it is expressly granted by its charter: *State v. Bright*, 38 La. Ann. 1; 58 Am. Rep. 155. Compare *Port Huron v. Jenkinson*, 77 Mich. 414; 18 Am. St. Rep. 409, and note.

COX, HILL, AND THOMPSON v. BEARDEN.

[84 GEORGIA, 304.]

MASTER AND SERVANT — RECOVERY OF WAGES. — A servant wrongfully discharged after rendering part of the services contracted for may, by waiting until the expiration of the term, bring his action for wages as though he had actually performed his contract, and is *prima facie* entitled to recover at the rate stipulated in the contract. The employer may reduce the recovery by so much as the servant did earn, or could by the use of ordinary diligence have earned, in other employment of like kind. The burden of proof to establish such reduction rests upon the employer.

EXEMPTIONS — WAGES. — A clerk or other employee wrongfully discharged before the expiration of his term may, upon its expiration, bring suit to recover the wages due for the entire term, and the money thus recovered will be exempt from garnishment as though earned by actual service.

EXEMPTIONS — WAGES IN HANDS OF SHERIFF NOT LIABLE TO SEIZURE. — Money employed as wages and exempt from garnishment while in hands of the employer, is also exempt from seizure by other process, while in the hands of the sheriff.

GARNISHMENT. John A. Bearden sued one Hammond to recover \$240 alleged to be due him for services rendered as clerk. He recovered a judgment for \$134.80, with costs. A *fiery facias* issued on this judgment, and without levy Hammond paid the amount of it to the sheriff. At the time of this payment the sheriff held *fiery facias* of Cox, Hill, and Thompson against Bearden, with notice to hold all money belonging to the latter coming into such officer's hands, to be applied to these *fiery facias*. Bearden then brought suit against the sheriff, and Cox, Hill, and Thompson, to recover such money in the hands of the officer, and recovered judgment. The plaintiffs in error appealed.

Foster and Butler, for the plaintiffs in error.

McHenry and McHenry, for the defendant in error.

BLECKLEY, C. J. The facts of this case are sufficiently stated in the official report. By the code, section 3554, "all journeymen mechanics and day-laborers shall be exempt from the process and liabilities of garnishment on their daily, weekly, or monthly wages, whether in the hands of their employers or not." Under this section, it has been several times ruled that the monthly wages of a clerk are embraced in the exemption: See cases cited in *Abrahams v. Anderson*, 80 Ga. 570; 12 Am. St. Rep. 274. The exemption in this case is resisted on two grounds.

1. The first is, that the money paid to the sheriff by Hammond on the *fiery facias* against him in favor of Bearden was not wages, but damages recovered for the breach of a contract of employment made by Hammond with Bearden for the services of the latter as a clerk. It appears, however, that although Bearden was discharged, he brought an ordinary action after the term for which he was employed had expired, predicating it upon an open account for a balance of wages due him at forty dollars per month. He recovered on that action, and it seems well settled by decisions of this court that the action was well brought for wages, notwithstanding he was prevented by a wrongful discharge from actually rendering the services sued for: *Blun v. Holitzer*, 53 Ga. 82; *Isaacs v. Davies*, 68 Ga. 169; *Waxelbaum & Co. v. Limberger*, 78 Ga. 43; and see *Echols v. Fleming*, 58 Ga. 156; *Newman v. Reagan*, 63 Ga. 755; *Howard v. Chamberlin*, 64 Ga. 684; *Newman v. Reagan*, 65 Ga. 512; *Kennedy v. McCarthy*, 73 Ga. 346. The state of our law on the subject seems to be this: that where a servant is

wrongfully discharged after rendering a portion of the services contracted for, he can, by waiting until the expiration of the term, bring his action for wages as though he had actually performed his contract, and will *prima facie* be entitled to recover wages at the rate stipulated in the contract; but the employer may reduce the recovery by so much as the servant did earn, or could by the use of ordinary diligence have earned, in other employment of like kind, the burden of proving the facts requisite to establish such reduction being upon him, the employer. The doctrine of constructive service recognized by Lord Ellenborough in *Gandell v. Pontigny*, 4 Camp. 375, still prevails in Georgia, and as to overseers is expressly recognized by the code, section 2217, though the doctrine seems to be generally denied, or at least doubted, as sound law both in England and this country: 2 Chitty on Contracts, 855; Smith on Master and Servant, 188-196; Wood on Master and Servant, sec. 127, p. 254; Schouler on Domestic Relations, sec. 472; Macdonald on Master and Servant, 193, 194; Smith's Lead. Cas. 45, 46, in notes to *Cutter v. Powell*. Abiding by our own cases, we hold that the suit in question was for monthly wages, and that the money collected as a consequence was compensation realized upon a contract for services as a clerk. Whether, if the suit and recovery had been for damages for the breach of such a contract by discharging the clerk, the money would have stood in lieu of wages, and thus have been exempt from garnishment by an equitable construction of the statute, we need not consider.

2. The second ground of resistance to the exemption claimed is, that the statute is confined to garnishment, and does not operate unless the fund is brought into court by that process. Here garnishment was not used, but the payment was made voluntarily by the employer to the sheriff upon the judgment, and *feri facias* in favor of the clerk. True, the letter of the statute is confined to garnishment; but the substantial matter contemplated by the legislature was the exemption of wages from seizure by the laborer's creditors, and garnishment was specified particularly only because it was the usual means of making such seizures. In this instance, the creditors attempted to make it through a rule against the sheriff, brought by the clerk himself, and to which they caused themselves to be made parties. We think that if they could not reach the fund by garnishment, they could not do it by using a rule as a substitute for garnishment. As the fund was exempt while

in the hands of Hammond, his payment of it to the sheriff was equivalent to paying it to the plaintiff, Bearden. The sheriff was the agent appointed by law to receive it for Bearden, and it is no more subject to be taken from the sheriff than it would be from any other agent who had received it in behalf of Bearden. Though it had not actually reached him, it was on its way to his hands. Had the money been brought in by garnishment, Bearden could have withdrawn it by rule against the sheriff: *Curran v. Fleming*, 76 Ga. 98. We think it makes no difference that it was brought in by other means.

Judgment affirmed.

MASTER AND SERVANT — RIGHTS OF SERVANT WRONGFULLY DISCHARGED.

— A contract of hire for a specified term being broken by the master, the servant may recover damages for the breach: *Lüchenstein v. Brooks*, 75 Tex. 196; but the servant must make an effort to obtain employment elsewhere: *Emery v. Steckel*, 126 Pa. St. 171; 12 Am. St. Rep. 857, and note 859, 860; *Simon v. Allen*, 76 Tex. 398; still he need not accept employment of a substantially different character: *Hinchcliffe v. Koontz*, 121 Ind. 422; 16 Am. St. Rep. 403. In *Keidy v. Long*, 71 Md. 385, where one employed for a year at a specified salary, payable monthly, was discharged before the expiration of two months, and having received a month's wages, sued for and recovered judgment for her services up to the date of her discharge, it was decided that she could not afterwards sue for a breach of the contract. The burden of proof is upon the master to show that the servant could have procured other employment: *Cincinnati etc. Ry Co. v. Lutes*, 112 Ind. 276; *Emery v. Steckel*, 126 Pa. St. 171; 12 Am. St. Rep. 857.

EXEMPTIONS, WHAT IS INCLUDED IN. — A judgment for the wrongful conversion of exempt property is itself exempt: *Below v. Robbins*, 76 Wis. 600; *ante*, p. 89, and note. But see *Burke v. Hance*, 76 Tex. 76; 18 Am. St. Rep. 28.

RHODES v. GEORGIA RAILROAD AND BANKING Co.

[84 GEORGIA, 320.]

MASTER AND SERVANT — NEGLIGENCE OF INFANT. — Whether a boy thirteen years of age, who voluntarily assumes to assist the servants of a railroad company, at their request, in moving a loaded car, without the knowledge or consent of the company, and while thus engaged places himself in a dangerous place, in consequence of which he is killed, is guilty of negligence is for the jury to determine from the evidence. If he had sufficient capacity to know the distinction between good and evil, and to protect himself, he would be responsible for his conduct, and there could be no recovery; and if he did not have sufficient capacity, there might be a recovery, if the jury believed the company was negligent.

NEGLECTANCE — RESPONSIBILITY OF INFANTS. — An infant under the age of ten years *prima facie* does not have sufficient capacity and knowledge to make him responsible for his conduct and acts, and capacity must be shown. An infant who has arrived at the age of fourteen years *prima facie* has such capacity, and want of it must be shown. Between the ages of ten and fourteen, the infant must be shown to have had capacity to comprehend and avoid danger, before he can be held responsible for his acts. The question is then for the jury, and not for the court, to determine.

MASTER AND SERVANT — VOLUNTEER NOT FELLOW-SERVANT. — A person who voluntarily assumes to assist the servants of a railroad company, at their request, in moving a loaded car, without the knowledge or consent of the company, is merely a volunteer, and not a fellow-servant with them.

MASTER AND SERVANT — WHO ARE NOT FELLOW-SERVANTS. — To constitute a servant, there must be some contract, or some act on the part of the master, which recognizes the person as a servant, either express or implied, and a person who assists the servant of another, either gratuitously or at the request of such servant, in an emergency, cannot recover from the master on account of the negligence or misconduct of such servant.

Foster and Butler, for the plaintiff in error.

J. B. Cumming, and Billups and Mustin, for the defendant in error.

BLANDFORD, J. The plaintiff in error brought his action against the defendant in error to recover damages for the homicide of his son, and the following is, in substance, the declaration filed by the plaintiff: On the eighth day of October, 1887, William Rhodes, the son of plaintiff, thirteen years old, was asked by one Andrew Love, an employee of the defendant, to assist in the movement, by hand, of a loaded car of defendant, it being the business of said Andrew Love to move cars as this one was being moved. This car was being shoved by hand along the side-track of the defendant at its depot at Madison. In response to said request, the said William Rhodes joined defendant's employees and other persons, who, like himself, had been asked to assist, at the rear end of the car. He endeavored to help push it along the side-track in the desired direction. There not being sufficient room not occupied by others for him to get to the car so as to make his efforts effective, "an agent and employee, seeing this, directed him, the said William, to go in front of said car, where there was no other person, and to lend his assistance by pulling. In obedience to said direction or request," the said William Rhodes went to the front of the car, and seizing a

round of the ladder attached thereto, commenced pulling. Other persons were behind the car and on each side pushing, and he alone in front pulling, and entirely out of sight of all the agents and employees of the defendant, and of the other persons engaged in moving the car. As the said William Rhodes was walking backward and pulling with all his strength, he stumbled over a stone which was lying between the rails of said side-track, and which the employees of the road were in the habit of using for the purpose of "scotching" cars when moved as this was being moved. "Being quite exhausted by his exertion in pulling, he was unable to recover himself, and those behind and on each side, not seeing or knowing of his perilous condition, continuing to shove and push said car," he was run over and killed. The agents and employees of defendant "were wanting in care and diligence in asking the said William Rhodes, a youth of tender years, to assist them in moving said car." Also, "in permitting him to assist them." Also, "they were careless and negligent in having said stone between the rails of said side-track." Also, "they were grossly negligent and carelessly unmindful and indifferent of human life in putting a youth of such tender years in a position of itself so dangerous, which was, in this instance, greatly enhanced by the fact that he could not be seen by others engaged in moving said car, and there was no agent, employee, or other person, engaged in moving or superintending the moving of said car, placed by said company or its employees in front of said car, or in such position as to keep a lookout ahead to see on the track, and give such notice or warning as might become necessary to prevent accident or injury to any one."

To this declaration the defendant demurred, upon the ground that the same was not sufficient in law to authorize a recovery by the plaintiff. This demurrer was sustained by the court, and the plaintiff excepted, and brings the case here for review.

The main question in this case is, whether one who is alleged to have been but thirteen years of age had sufficient discretion as *prima facie* to know what he was doing and be responsible therefor. It may be laid down as a general rule that a person who assumes to assist the servant of another, without being authorized so to do by the master, and while thus acting becomes injured, has no right of action against the master for his injury, upon the ground that he is a mere vol-

unteer. But where one who was of the age of thirteen years assumed upon his part to assist the servants of a railroad company in moving a loaded car, and while thus employed was injured to such an extent that he died, and such service on his part was without the knowledge or consent of the railroad company, and without any authority from the company so to act, would the company under such circumstances be liable for an injury to such person? If the person were an adult, there would clearly be no liability on the part of the company. But as the declaration alleges that the person thus injured was of the tender age of thirteen years, whether the company would be liable or not would depend upon the amount of discretion and knowledge which such infant had at the time.

Our code, section 4294, declares that "a person shall be considered of sound mind who is neither an idiot, a lunatic, or afflicted by insanity, or who hath arrived at the age of fourteen years, or before that age, if such person know the distinction between good and evil." Section 4295 declares that "an infant under the age of ten years, whose tender age renders it improbable that he or she should be impressed with a proper sense of moral obligation, or be possessed of sufficient capacity deliberately to have committed the offense, shall not be considered or found guilty of any crime or misdemeanor. Our code further declares a person under the age of fourteen years incompetent to make a will; but if of that age, he is competent as by the common law. An infant fourteen years of age may act as an executor to a will, if the testator so direct. It is insisted by counsel for the defendant in error that the court should declare, as a matter of law, that a person thirteen years of age had sufficient discretion and knowledge to render him responsible for his acts. We do not think that the court is authorized so to declare; but in view of our code, the court could declare that an infant who had arrived at the age of fourteen years *prima facie* had sufficient capacity and knowledge of right and wrong to make him responsible for his conduct and acts; that an infant under the age of ten years *prima facie* did not have such discretion and capacity, and could not be charged with a knowledge of right and wrong, so as to make him responsible for his acts or conduct, unless it was clearly shown he had such capacity and discretion. Between the ages of ten and fourteen years, if a person knew the distinction between good and evil in the particular instance, he

would be liable for his acts and conduct. But in a case like the present, where the infant is under the age of fourteen, before he could be held responsible for his acts and conduct, it would have to be shown by proof that he knew the distinction between good and evil, and had capacity to comprehend the danger and avoid the same. The court cannot, of itself, determine these questions so as to fix the responsibility upon him for his act. They would be for determination by the jury, upon the proofs submitted on the trial of the case; and we are of the opinion that if the son of the plaintiff in error (who had not arrived at the age of fourteen years) knew, or had sufficient capacity to know, the distinction between good and evil in the particular instance, and to protect himself, he would be responsible for his own conduct. And if this should turn out to be the case, then if the plaintiff's son voluntarily, at the request of defendant's servants, assisted said servants in moving the car, and while thus engaged placed himself in a perilous condition, in consequence of which he was killed, there could be no recovery. But if he did not have sufficient capacity, there might be a recovery, should the jury believe the company was negligent. It is apparent from this declaration that the plaintiff's son, who was killed, was but a mere volunteer, and what he did was voluntary on his part, and without the knowledge or consent of the defendant in error. Therefore, if he did have sufficient capacity, his father could not recover for his homicide. This will depend upon the facts submitted in proof to the jury.

We think what we have said on the subject of the discretion of the son is fully sustained by the case of *Nagle v. Allegheny V. R. R. Co.*, 88 Pa. St. 35, 32 Am. Rep. 413, in which it is decided that an infant of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger, and have power to avoid it, and that this presumption will stand till overthrown by clear proof of the absence of such discretion as is usual with infants of that age. The court may further decide, as a question of law, that *prima facie* an infant under the age of ten years has not sufficient capacity to be sensible of danger, or have the power to avoid it, and this presumption will continue until overcome by proof showing the contrary. Whether, therefore, in the present case, the plaintiff's son had sufficient capacity to be sensible of danger, and to have the power to avoid it, is a question for the jury, he being of that age at which our code says that if he knew the distinction

between good and evil he would be responsible; otherwise he would not be.

The plaintiff's son was not a fellow-servant with the servants of the defendant in error. To be the servant of another, there must be some contract, or some act on the part of the master which recognizes the person as a servant, either express or implied. It is laid down as a general rule that a person who assists the servant of another in an emergency cannot recover from the master on account of the negligence or misconduct of the servant. Such servant cannot, by his officious conduct, impose a greater duty on the master than that which the latter owes to his hired servant at common law; and it is immaterial whether the injury occurred while assisting the servant gratuitously or at the request of the latter: See *Dregg v. Midland R. R. Co.*, 1 Hurl. & N. 773; *Osborne v. Knox etc. R. R. Co.*, 68 Me. 49; 28 Am. Rep. 16; 2 Thompson on Negligence, 1045. In *Holmes v. Northeastern R. R. Co.*, L. R. 4 Ex. 254 (affirmed in exchequer chamber, L. R. 6 Ex. 123), the plaintiff was a person entitled to the delivery of a wagon-load of coals from the defendant, a railway company. The usual mode of delivery was impossible, on account of the crowded state of the station. He was hence allowed by the company's station-master to go to another place, where the wagon was to get the coals, and while so doing he fell through a hole, owing to the negligent keeping of the company's premises. The court held that he was engaged, with the consent of the company, in a transaction of interest to both parties, which prevented him from being there as a volunteer, and entitled him to have the company's premises kept in a reasonably safe condition; and he was allowed to recover: So, also, in the case of *Wright v. London & Northwestern R'y Co.*, L. R. 1 Q. B. Div. 252. In this case the case of *Holmes* was cited by Lord Coleridge, C. J., with approval. The case referred to places the liability of the company upon the ground that the plaintiff was not a mere volunteer, but was there on the company's premises for the purpose of attending to his own business, which was likewise connected with the business of the company. The plaintiff and the defendant seem to have had an interest in common in the business to be transacted. But in the present case there was no business in common between the plaintiff's son and the defendant. He was not there even as a licensee by the company. The cases which have been referred to do not sustain the contention of the plaintiff in error.

We think, however, that the court erred in sustaining the demurrer to the plaintiff's declaration, for the reasons we have already stated, and the judgment is reversed.

MASTER AND SERVANT — NEGLIGENCE OF INFANT. — If an infant has not the mental capacity to appreciate danger, he may recover for injuries sustained in a dangerous employment: *Gulf etc. R'y Co. v. Jones*, 76 Tex. 350. In determining whether an infant is guilty of contributory negligence, his intelligence must be taken into consideration: *Gulf etc. R'y Co. v. McWhirter*, 77 Tex. 356. Compare extended note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 590-596, on the question of the negligence of infants.

MASTER AND SERVANT — WHO IS A SERVANT. — Mere volunteers are not ordinarily deemed servants: Note to *Street R'y Co. v. Bolton*, 54 Am. Rep. 805; note to *Fox v. Sandford*, 67 Am. Dec. 597; *Covel v. Turner*, 74 Mich. 408.

MASTER AND SERVANT — FELLOW-SERVANTS. — As to who are fellow-servants and who are not: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note; *Louisville etc. R'y Co. v. Petty*, 67 Miss. 255; 19 Am. St. Rep. 304, and note; *Richmond etc. R. R. Co. v. Williams*, 86 Va. 165; 19 Am. St. Rep. 876, and note. An engineer and fireman upon an engine are fellow-servants: *Gulf etc. R'y Co. v. Blohn*, 73 Tex. 637. So are an engineer on a locomotive used in drawing flat-cars and a laborer employed in loading such cars: *Lake Shore etc. R'y Co. v. Stupak*, 123 Ind. 210; and a section-master and a laborer under him, both engaged in the common service of track-repairing: *Lagrone v. Mobile etc. R. R. Co.*, 67 Miss. 592. In *Bergquist v. Minneapolis*, 42 Minn. 471, it was decided that a city laborer employed in digging a trench was a fellow-servant with those whose duty it was to put in wooden curbing as the trench progressed. In determining whether one is a fellow-servant or a vice-principal, it is not the rank and authority such person has, but the nature of the service he performs, which must be taken into consideration: *Lindvall v. Woods*, 41 Minn. 213; *Galveston etc. R'y Co. v. Farmer*, 73 Tex. 85.

WATERTOWN STEAM ENGINE COMPANY v. PALMER BROTHERS.

[84 GEORGIA, 368.]

PRINCIPAL AND AGENT — ESTOPPEL AS AGAINST PRINCIPAL. — Where an authorized agent brings bail trover in his own name to recover a horse belonging to his principal, and with the assistance of the latter, who does not assert his title at the time, recovers judgment, after which the surety in the bail bond pays the condemnation money into court, the principal is not estopped by his acts to claim the fund as against the agent's creditors, who gave him credit before the trover suit was commenced, and not on the faith of property involved therein, and who were not parties to that suit nor prejudiced by the acts and admissions of the principal.

S. A. Reid, and Harrison and Peebles, for the plaintiff in error.

Turner and Willingham, for the defendants in error.

SIMMONS, J. The record in this case shows the following to be, in substance, the facts of the case: J. C. Pinkerton represented the Watertown Steam Engine Company as its southern agent, and made a settlement with one Tyson for an engine, taking two mules from him in part settlement of his note to the company. Pinkerton kept the mules at Davis's stables. One of them died, and the other was traded to one Pope for a sorrel horse. One Cook got possession of this horse in some way, and Pinkerton brought bail trover therefor. Mansfield stood Cook's security on the bail bond. Pinkerton recovered the value of the horse. In the litigation about the horse the Watertown company assisted, paying counsel his fees. The suit was brought in the name of Pinkerton. After judgment in the suit was obtained, Palmer Brothers sued out a summons of garnishment for Mansfield, the security on the bail bond, they having previously obtained judgments against Pinkerton. The Watertown company dissolved the garnishment. Mansfield answered that when the Watertown company dissolved the garnishment by filing the bond, he paid over to the bailiff of the court \$196, that being the amount for which he was liable as security on the condemnation bond in the bail trover case. The Watertown company claimed as its property the fund thus paid in, as standing in place of the mule exchanged for a horse which belonged to it. Under the charge of the court, the jury found against the claimant, the Watertown company, in favor of Palmer Brothers. The claimant made a motion for a new trial upon the several grounds set out therein, which was overruled by the court, and it excepted.

Without discussing the many technical grounds set out in the motion, we will confine ourselves to the real merits of the case; and upon the merits, we think the court erred in charging as set out in the tenth ground of the amended motion. The substance of that charge is, that if the Watertown Steam Engine Company had knowledge and notice of the pending suit, and aided Pinkerton by employing counsel, and set up no claim itself at the time, or did not require its agent to sue in his own name for its use, it is bound thereby; and if, before asserting its claim, the money was garnished by a judgment creditor of Pinkerton, it would be in law the property of Pinkerton, and bound for the payment of the judgment creditor. In other words, if the Watertown company aided Pinker-

ton in recovering this property, without disclosing that it was its property, it would be estopped from claiming the fund arising therefrom, as against the garnishing creditor.

We do not agree with the court below in this view of the law. The evidence shows that Pinkerton was the agent of the Watertown company, with full authority to collect debts, settle claims, and convert property into cash for the company, and that he did settle one of its claims, taking two mules in payment therefor, one of which was exchanged for a horse. Cook converted this property, and Pinkerton brought suit against him. Pinkerton was in possession of the property when it was unlawfully converted by Cook, and under the code he had a right to bring this suit in trover, and to recover the property or its value. It is true, he brought the suit in his own name, and was aided therein by the Watertown company; but we do not see how this fact should estop the company, as between it and Palmer Brothers. It appears from the record that Palmer Brothers' debt against Pinkerton was contracted before this suit by Pinkerton against Cook was instituted. The credit, therefore, was not given on the faith of this property; and this being true, we cannot see how Palmer Brothers could be injured by allowing the real owner of the property to assert its claim thereto, although the agency of Pinkerton was unknown. In the case of *Woodruff v. McGehee*, 30 Ga. 158, it was held: "When an agent makes a contract for his principal, but conceals the fact that he is an agent, contracting as if he were principal, the principal may at any time appear in his true character, and claim all the benefits of the contract from the other contracting party, so far as he can do so without injury to that other by the substitution of himself for his agent." Stephens, J., in delivering the opinion, says: "The reason of the doctrine is, that it is but just that every man should have what really, though secretly, belongs to him, so far as he can obtain it without injuring another by appearing in his true character of owner." See also the case of *Spain v. Beach*, 52 Ga. 494, in which "A, the agent of B, having in hand certain money belonging to B, deposited it in bank to his own credit, he having already there a credit to himself, whereupon a creditor of A garnished the bank. B filed a claim affidavit and bond under the act of 1871 (Code, secs. 3541, 3543), and his money was paid him on A's check. A dissolved the garnishment in the usual mode, and got the

balance on his own check. Held, that B might assert his right to the money in this way."

Palmer Brothers, not being parties to the trover suit, and not having given credit to Pinkerton on the faith of this property, cannot be injured or damaged by allowing the Watertown company, the true owner, to set up a claim to the property. Nor, in our opinion, can they assert the doctrine of estoppel against the Watertown company. If the Watertown company were now suing Cook and Mansfield for this horse, under the facts disclosed by the record, we think the doctrine of estoppel could be asserted by Cook and Mansfield against it; but it does not apply as between the Watertown company and Palmer Brothers. Nor was the fact that it assisted Pinkerton in the suit for the recovery of the horse such an admission by it of the title being in him as would estop them from setting up their own title against any persons not parties to that suit nor prejudiced by the admission.

2. It was insisted by counsel for the defendants in error that even if the Watertown company was not estopped from setting up title, it would still not be entitled to the fund in court, because the fund was not paid in by Cook, against whom the trover suit was brought, but by Mansfield, as security on the bail bond; and he refers to the case of *Cairns v. Iverson*, 3 Ga. 132, to sustain that position. The facts of that case are very different from the facts in this. In that case the creditor sued the administrator, and obtained a judgment *quando*. The heir at law sued the administrator, and had a judgment absolute. The administrator absconded, and his surety paid to the heir at law the amount of the judgment. A creditor filed his bill against the heir at law, and alleged that, inasmuch as creditors were entitled to the property before distributees, the heir should pay to him the amount received from the surety. The court in that case held that the money paid by the surety was not money belonging to the estate, and therefore the creditor was not entitled to it. In this case, when Pinkerton sued Cook, he at the same time required him to give bail, and in pursuance of the statute, Cook gave a forthcoming bond, with Mansfield as security, and agreed therein to answer such judgment, execution, or decree as might be rendered or issued in the case, and agreed to be bound for the payment of the eventual condemnation money. So that the money paid into court by Mansfield, the security, was the fruit of Pinkerton's suit against Cook for the wrongful conversion of the horse.

For these reasons, we think the court below erred in refusing to grant a new trial in this case.

Judgment reversed.

AGENCY — RIGHTS OF UNDISCLOSED PRINCIPAL. — An undisclosed principal may sue or be sued upon contracts not under seal made by or with his agent: Note to *Eastern R. R. Co. v. Benedict*, 66 Am. Dec. 389.

BAER v. ENGLISH & Co.

[84 GEORGIA, 403.]

ASSIGNMENTS — BILL OF EXCHANGE. — An ordinary negotiable bill of exchange, unaccepted in writing, and not drawn against any particular fund, does not operate in the hands of the payee as a legal or equitable assignment of a debt due by account from the drawee to the drawer, nor can it so operate in the hands of the payee as collateral security for the payment of his debt so as to give him a preference over another creditor of the drawer. Such creditor may therefore summon the drawee by garnishment at any time before the bill is accepted in writing or paid in full or in part, to the extent of the debt due.

ASSIGNMENTS — BILL OF EXCHANGE — GARNISHMENT. — The acceptance of a bill of exchange, to be binding, must be made in writing, and an oral promise to pay so much of it as may be found to be due, made by the drawee, will not act as an equitable assignment to the payee, so as to prevent other creditors of the drawer from securing the debt by garnishment against the drawee before the bill is accepted in writing or paid to the amount of the debt due.

Hardeman, Davis, and Nottingham, for the plaintiff.

Dessau and Bartlett, for the defendants.

BLECKLEY, C. J. Myrick and Bowman were indebted to Gordon by book-account, and Gordon was indebted to English & Co. also by account. Gordon turned over to English & Co. his books and papers for them to ascertain therefrom the amount which Myrick and Bowman owed him, with a view to their collecting the same and applying the money when collected to their account against him, Gordon. The amount being thus ascertained and fixed at \$665, Gordon signed a bill of exchange on Myrick and Bowman for that sum, payable at sight to the order of I. C. Plant and Son, and delivered it to English & Co., leaving with them the books and papers to which reference had been made in arriving at the amount for which the bill was to be drawn. Plant and Son were the bankers of English & Co., and had no beneficial interest in

the bill. It was made payable to their order at the suggestion of English & Co., and for their convenience in collecting. The bill was never accepted by the drawees in writing, and consequently never became obligatory upon them: Code, sec. 1950; *Ingle v. Davis*, 81 Ga. 766. It was presented to them, however, by English & Co., without any indorsement upon it, and they promised orally to pay when they ascertained for themselves how much they owed Gordon, which it was understood would be in a few days. But before they were ready to make payment, they were served with garnishments at the instance of Baer as a creditor of Gordon. To these garnishments they answered that their indebtedness to Gordon was \$253.96, but that before being summoned as garnishees they had, with the knowledge and verbal approbation of Gordon, made to English & Co. an oral promise to pay to them. English & Co. interposed their claim as pointed out in section 3541 of the code, and traversed so much of the answer as recognized the debt as owing to Gordon, they insisting that it was their property. At the trial of the claim, the facts appeared substantially as above set out. It further appeared that the bill remained unindorsed until the day before the trial, and that it was then indorsed by the payees in blank without recourse on them. Also, that, pending the garnishments, and after they were answered, the garnishees paid over to the claimants, by way of compromise, in full of the debt to Gordon from Myrick and Bowman, three hundred dollars, which sum was then credited to Gordon on his account with English & Co., the claimants, no credit of any amount having been previously entered on that account. The jury found for the claimants, and the court refused to grant a new trial. Besides the general grounds, the motion for a new trial presents several special grounds; but we grasp the case as a whole, and deal with the essential elements that control it.

1. The bill on its face was an ordinary bill of exchange, negotiable as commercial paper, based on the general credit of the drawer, not upon any particular fund. According to all the authorities, it would not operate as a legal assignment of the account owing by Myrick and Bowman, the drawees, to Gordon, the drawer. And according to the decided preponderance of authority, it would not operate as even an equitable assignment of that account: 1 Am. & Eng. Ency. of Law, 836; 6 Am. & Eng. Ency. of Law, 657, 658; 1 Daniel on Negotiable Instruments, secs. 19 et seq.; Tiedeman on

Commercial Paper, secs. 5 et seq.; 2 Randolph on Commercial Paper, sec. 589; 1 Parsons on Bills and Notes, 331 et seq.; 1 Edwards on Bills and Notes, secs. 531, 532; *Whitney v. Eliot Nat. Bank*, 137 Mass. 351; 50 Am. Rep. 316.

2. There may be cases (see *Daniel v. Tarver*, 70 Ga. 203) in which the doctrine of equitable assignment would still have application, notwithstanding the code furnishes the means by which to accomplish a legal assignment without any aid from equitable principles. But we think the case of making preferences by a debtor between his existing creditors is not one of them. The code, section 1953, provides that "a debtor may prefer one creditor to another, and to that end he may *bona fide* give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer negotiable papers as collateral security, the surplus in such cases not being reserved for his own benefit or that of any other favored creditor, to the exclusion of other creditors." He may sell an account in payment of his debt, or he may transfer negotiable papers as collateral security. But an account, not being negotiable paper, cannot, we think, be transferred as collateral security for an existing debt to the prejudice of another existing creditor. Or if it can be done at all, certainly not without writing expressly manifesting the transfer. A preference by mere equitable assignment, unless made to extinguish a debt, should not be recognized: *Gamble v. Central Railroad etc. Co.*, 80 Ga. 600; 12 Am. St. Rep. 276. Here the debts to the garnishing creditor were in existence when the bill was drawn, and the debt to English & Co. was not extinguished, nor was any part of it extinguished by the delivery of the bill, or by anything done or agreed to be done, before the garnishments were served.

There are authorities to the effect that such a bill, notwithstanding its negotiable element, may be used in connection with extrinsic evidence manifesting the intent of the parties to establish an equitable assignment. The case of *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83, was urged upon us in argument as a decisive authority in favor of resorting to extrinsic evidence, but in the report it appears that all the evidence considered was in writing. Moreover, whether the draft involved in that case was negotiable is not stated, and according to what was said by the New York court of appeals in *Evansville Nat. Bank v. Kaufman*, 93 N. Y. 280, 45 Am. Rep. 204, the word "draft" does not necessarily or even

usually imply negotiability. The whole doctrine of equitable assignment of choses in action grew up in consequence of the fact that, as to many of them, there could be no other sort of assignment: See *Spain v. Hamilton*, 1 Wall. 604, cited in *Laclede Bank v. Schuler*, 120 U. S. 516. This reason, since the adoption of the code, no longer applies in Georgia. For, by section 2244, all choses in action arising upon contract are assignable so as to vest the title in the assignee. With us, therefore, where the parties really intend an assignment, they can execute their intention fully and completely. But, as ruled in *Turk v. Cook*, 63 Ga. 681, the assignment must not rest in parol, but must be in writing. See also *Planters' Bank v. Prater*, 64 Ga. 613; *Life Ins. Co. v. Watson*, 30 Fed. Rep. 653.

3. We think the drawing and delivery of the bill and the presenting of it for payment constituted no assignment, legal or equitable, of the debt owing by Myrick and Bowman to Gordon. And as Myrick and Bowman failed to accept the bill in writing, and thereby to create a legal obligation upon them to pay it in whole or in part, their willingness to pay, coupled with a parol promise to do so to the extent of their real indebtedness to Gordon, had no legal efficacy whatever: *Luff v. Pope*, 5 Hill, 413; affirmed in *Pope v. Luff*, 7 Hill, 577; *Dolsen v. Brown*, 13 La. Ann. 551; *Kimball v. Donald*, 20 Mo. 577; 64 Am. Dec. 209. Bronson, J., said, in *Luff v. Pope*, 5 Hill, 413: "To give a parol promise to pay the effect of a written acceptance of a bill would be no better than a device to get around the statute and defeat all the valuable ends which it was designed to accomplish." This seems to us a sound view of the subject. All the mischiefs of a parol acceptance, which the legislature designed to cut off by requiring written evidence of acceptance, would attach to oral promises like the one under consideration. Indeed, what was the promise made by Myrick and Bowman, but a qualified acceptance of the bill in parol? The case of *Griffin v. Weatherby*, L. R. 3 Q. B. 753, may be at variance with this doctrine, but although in that case the bill was not accepted as the statute required to render acceptance obligatory, yet the promise of the drawee was established by written correspondence. Perhaps, therefore, the ruling in that case could be upheld consistently with the principles of our law.

The court erred in not granting a new trial.

Judgment reversed.

NEGOTIABLE INSTRUMENTS. — As to whether a check operates as an assignment of the drawer's rights against the drawee before its acceptance, see note to *Hemphill v. Yerkes*, 19 Am. St. Rep. 609-612.

ACCEPTANCE OF BILLS — STATUTE OF FRAUDS. — The acceptance of a bill is not within the statute of frauds: *Mason v. Dousay*, 35 Ill. 424; 85 Am. Dec. 368; *Phelps v. Northup*, 56 Ill. 156; 8 Am. Rep. 681. *Contra*, under the California statute: *Wheatley v. Strobe*, 12 Cal. 92; 73 Am. Dec. 522. See also note to *Walker v. Lide*, 44 Am. Dec. 253, 254.

KENT v. STATE.

[84 GEORGIA, 438.]

CRIMINAL LAW — BURGLARY — WHAT CONSTITUTES BREAKING. — An entry into a factory, effected by turning the bolt of a door in the daytime, and not made for the purpose of lawful business, nor within business hours, is an entry by breaking, so as to constitute burglary within the meaning of section 4386, Georgia code.

BURGLARY. Indictment for and conviction of the burglary of goods from a factory.

Thornton and Cameron, for the plaintiff in error.

A. A. Carson, solicitor-general, and W. A. Little, for the state.

BLECKLEY, C. J. The case makes but one legal question, and that is, whether the breaking was such as to constitute the element of breaking in the offense of burglary. We think it was. The door was locked in the night-time, but only bolted in the daytime. It was bolted in this instance. The fastening was such as was usual at that hour. The hour, being between four and five o'clock in the morning, was so early as to afford no invitation to the general public to enter. There was no consent by the owner to an entry at such an hour by the public, or by any persons except those who, by reason of being employees, or for some other reason, had business in the factory. The employees had not yet arrived, nor had the day's business begun. The door was not open even to the honest public, and certainly it was closed as against visitors who came to commit crime, and for no other purpose. We think a bolt ought to be considered as something relied on as a security against intrusion, according to *State v. Boon*, 13 Ired. 244; 57 Am. Dec. 555; and that the turning of a bolt should be considered as a breaking, by violating the security designed to exclude, according to *State v. Newbegin*, 25 Me. 500, where a thief enters at such an hour for the sole purpose

of committing a larceny. Had the accused made an entry on some other business, and whilst in the house had committed a larceny, the offense would not have been burglary, but only larceny from the house. But an entry by turning a bolt, not made for the purpose of lawful business, nor within business hours, is an entry by breaking. That the opening of a door secured by a bolt only will constitute breaking, see 2 East P. C. 487; 2 Roscoe's Crim. Ev. 347; Bishop on Statutory Crimes, sec. 312; 2 Wharton's Crim. Law, sec. 1532.

The indictment was founded on section 4386 of the code, which declares that "burglary is the breaking and entering into the dwelling, mansion, or storehouse, or other place of business, of another, where valuable goods, wares, produce, or any other article of value are contained or stored, with intent to commit a felony or larceny."

There was no error in overruling the motion for a new trial. Judgment affirmed.

BURGLARY — WHAT CONSTITUTES A BREAKING as an element of the crime of burglary: *Grimes v. State*, 77 Ga. 762; 4 Am. St. Rep. 112, and note; *Daniels v. State*, 78 Ga. 98; 6 Am. St. Rep. 238; extended note to *People v. Richards*, 2 Am. St. Rep. 383-399. An entry into a house under a claim of right, without violence, does not constitute a breaking: *Thompson v. Commonwealth*, 116 Pa. St. 155. For the meaning of the expression "any out-house belonging to or used with any dwelling-house," as used in the Kentucky statute regarding burglary, see *White v. Commonwealth*, 87 Ky. 454.

NELMS v. STATE.

[84 GEORGIA, 466.]

CRIMINAL LAW — BIGAMY. — After verdict of guilty of bigamy, it is no ground for arrest of judgment that the indictment charged that defendant's lawful wife was "one — Nelms," whose name was not known to the grand jury.

CRIMINAL LAW — BIGAMY. — Under an indictment charging defendant with bigamy, and that his lawful wife was "one — Nelms," whose name was not known to the grand jury, evidence is admissible to show her true name.

CRIMINAL LAW. — Bigamy is committed by a married man who, having a wife living, marries another woman, though he does not cohabit with her, and is arrested immediately after the performance of the marriage ceremony.

R. H. Powell, for the plaintiff in error.

J. M. Griggs, solicitor-general, for the state.

BLANDFORD, J. The plaintiff in error was indicted for the offense of bigamy, and found guilty. He moved to arrest the judgment, upon the ground that the bill of indictment charged that he intermarried with one Mattie E. Gurr, he then having a lawful wife living, to wit, "— Nelms," whose given name was not known to the grand jurors. The court overruled this motion, and he excepted. He also objected to the testimony showing the true name of the woman whom he formerly married. The court overruled this objection, and he excepted. He asked for a new trial, upon the ground of error in the ruling of the court as before stated, and upon the further ground that the evidence did not show that after his second marriage he ever cohabited with the person to whom he was married. The court overruled this motion for a new trial, and he excepted to that.

1. We do not think there is anything in any of the grounds of exception taken by the plaintiff in error. In the case of *Commonwealth v. Stoddard*, 9 Allen, 280, it was held by the supreme court of Massachusetts that "if the name of a person injured is unknown to the grand jury, it may be so alleged in the indictment, although they might by reasonable pains have ascertained the name." In the case of *State v. Wilson*, 30 Conn. 507, it was held by the supreme court of that state: "That which, from the nature of the case, cannot be alleged, need not be; and it is of frequent occurrence that the name of the person injured is unknown. Justice must not fail, nor the community go unprotected, for such cause. If the name is unknown, and it is so averred, it need not be proved"; but if "it appears on the trial that the name was in fact known, it is held that he is entitled to acquittal: Archbold's Crim. Pl. 33." In the case of *Commonwealth v. Sherman*, 13 Allen, 248, it was held by the court that "if the name of a person whom it is necessary to refer to in a complaint is unknown to the complainant, it may be so alleged, although he might easily have ascertained the same. . . . If the name of a third person which, if known, should be inserted in the indictment or complaint is in fact unknown to the grand jury or the complainant, it may be so alleged; and the defendant is not thereby deprived of his protection against being tried twice for the same offense, for if indicted again, he may plead his acquittal or conviction upon the first indictment, and aver the person to be the same: 2 Hawk. P. C., c. 25, sec. 71; 1 Starkie's Crim. Pl., 2d ed., 185-188." In this latter case the question

here is discussed at great length. See also *Cheek v. State*, 38 Ala. 227. We are of the opinion that the court was right in overruling the motion for an arrest of judgment, and in overruling the objection to testimony showing the name of the person to whom the accused was first married.

2. The next point insisted upon by the accused is, that there was no evidence of any cohabitation by him with the person to whom he is alleged to have been married the second time. We think, under our code, that where a person has been once married, and whose wife is still living at the time he marries another woman, this constitutes the crime of bigamy, although he may never have had any carnal knowledge of the second woman, and may have been arrested immediately after the performance of the ceremony, the maxim being, *Consensus non concubitus facit nuptias*. It is the outrageous and villainous conduct of the defendant in marrying the second time which constitutes the crime, as was held by the supreme court of North Carolina in *State v. Patterson*, 2 Ired. 355; 38 Am. Dec. 699. "Marriage, or the relation of husband and wife, is in law complete when parties, able to contract and willing to contract, have actually contracted to be man and wife in the forms and with the solemnities required by law. . . . It is this contract which gives to each right or power over the body of the other, and renders a consequent cohabitation lawful. And it is the abuse of this formal and solemn contract, by entering into it a second time when a former husband or wife is still living, which the law forbids because of its outrage upon public decency, its violation of the public economy, as well as its tendency to cheat one into a surrender of the person under the appearance of right. A man takes a wife lawfully when the contract is lawfully made. He takes a wife unlawfully when the contract is unlawfully made, and this unlawful contract the law punishes." To the same effect was it held in the case of *Gise v. Commonwealth*, 81 Pa. St. 428. This latter case cites with approval the case in 2 Iredell above quoted from, and we think this is the true law of this case; and the judgment is affirmed.

BIGAMY, WHAT CONSTITUTES THE CRIME. — Bigamy is committed by the act of marrying one woman while the wife by a former marriage is still alive: *Johnson v. Commonwealth*, 86 Ky. 122; 9 Am. St. Rep. 269; *Dotson v. State*, 62 Ala. 141; 34 Am. Rep. 2. Cohabitation is not necessary to constitute the offense: Note to *State v. Johnson*, 93 Am. Dec. 252; and the crime is complete when the second marriage is solemnized: *State v. Smiley*, 93 Mo. 605.

WELCH v. AGAR.

[84 GEORGIA, 583.]

INFANCY — JURISDICTION. — Service of process upon a minor will not compel his appearance, after arriving at age, nor will the appointment of a guardian *ad litem* confer jurisdiction as to such minor when the guardian expressly declines to act.

PARTITION — TRUSTEE, WHEN PROPER PARTY. — A trustee who has a power of sale and reinvestment under the trust deed, is a proper though not a necessary party to an action to partition the land among the beneficiaries.

PARTITION, WHO ENTITLED TO. — A creditor who holds an absolute deed from one of the tenants in common as security for his debt is only entitled to partition with the concurrence of the debtor or upon showing good cause why partition should be made. In the absence of such showing, partition should not be made in opposition to the debtor.

PARTITION. The petition alleged that Agar was the owner in fee of an undivided one-third interest in certain city lots; that a Mrs. Hoge, a minor, was the owner of another third thereof, and that L. E. Welch, Jr., was the owner of the remaining third, and that the land could not be divided in kind. The petitioner asked that Hoge, the husband of Mrs. Hoge, be appointed guardian *ad litem* for her and served with the petition, and that Welch be also served. This was done, and at the trial Hoge refused to serve as such guardian, for the reason that one W. E. Mitchell was the duly appointed trustee for Mrs. Hoge, who had in the mean time attained her majority. The petitioner admitted that prior to the filing of the petition Mitchell had been regularly appointed trustee for Mrs. Hoge, *vice* H. E. Welch, the trustee named in the original trust deed, and had accepted the trust and had not been removed. L. E. Welch and Laura I. Welch thereupon objected to the trial proceeding, because the trustee had not been made a party. This objection was overruled. The trust deed was executed by L. E. Welch to Henry E. Welch as trustee of Laura I. Welch, wife of L. E. Welch, and her children, conveying the lots in question, with power in the trustee or his successor, to sell without order of court or consent of Laura I., in writing, and to reinvest the proceeds subject to the trust. The children were Mrs. Hoge and L. E. Welch, Jr. Henry E. Welch died, and Laura I. filed a petition asking that Mitchell be appointed "as the naked trustee" of petitioner and her minor children. The court so appointed Mitchell as trustee, and he accepted the trust. L. E. Welch, Jr., and Laura I. Welch objected that the deed to Agar under which his petition was filed was made to secure a debt due by Laura I. to

Agar, who had executed a bond to reconvey upon payment of the debt, that said Laura I. had remained in possession, and that the deed did not make him a common owner so as to entitle him to partition. The court gave judgment in partition, and the plaintiffs in error appealed.

D. H. Pope, W. R. Leaken, and R. G. Erwin, for the plaintiffs in error.

R. Hobbs and C. B. Wooten, for the defendant in error.

BLECKLEY, C. J. 1. Mrs. Hoge was a minor, and although service was made upon her, she did not appear or plead, nor did her husband accept the appointment of guardian *ad litem*, but expressly declined the same. The court should not have proceeded in spite of his declination, for the precise opposite is the spirit of our law. It contemplates an express acceptance, in order to make the infant a party with perfect regularity: Code, sec. 3263 a. If Mrs. Hoge had voluntarily appeared after she attained majority, that would have sufficed, as it seems she had arrived at age when the trial on the petition took place. But service upon her during her minority would not compel her appearance after arriving at age. The petition should be amended, alleging that she is no longer a minor, and copy of the amendment should be served upon her. Then she would be bound, whether she appeared or not, if in fact she be now of full age. The same result might be accomplished by an order reciting her arrival at age, and service upon her of such order.

2. As the formal legal title to the whole premises is perhaps outstanding in a trustee, it would also be better that he be made a party. The order appointing him calls him a naked trustee, but it goes on and clothes him with all the rights and powers conferred by the deed of trust upon the original trustee; and the original trustee took the power to sell and reinvest in conjunction with Mrs. Welch. It may be that this power is no longer exercisable, if all the minors interested in the property have attained their majority. We do not rule that he is a necessary party; but it would be judicious to bring him before the court, if it be designed to make the partition absolutely conclusive upon the title, both legal and equitable.

3. With respect to the right of a creditor who holds an absolute deed as security for his debt to have partition, there is some difficulty, because his title is defeasible, and because his bond is outstanding to reconvey, not an estate in severalty,

but an estate in common,—the same sort of estate which he acquired from his debtor as security. Following analogies, we would say that he can have partition, certainly so with the concurrence of his debtor, the holder of the bond for titles, and without such concurrence, if there be any good reason shown why he ought to have his estate in common changed to one in severalty. We find it ruled that mortgagees holding the legal title may, under some circumstances, have partition: *Colton v. Smith*, 11 Pick. 311; 22 Am. Dec. 375; *Rich v. Lord*, 18 Pick. 322; Barbour on Parties, 423; Freeman on Cotenancy, secs. 451, 452. See, however, 1 Jones on Mortgages, sec. 705. To grant partition at the instance of a creditor holding an absolute deed, as in the present case, would relieve him from reconveying the kind of estate which he holds, and which he has engaged by his bond to restore to his debtor upon payment of the debt. To work this result in opposition to the will of the debtor ought to require a very strong reason, inasmuch as the statute gives another remedy for realizing on such a security, namely, the execution of a deed, and levy and sale of the property after obtaining judgment on the debt: Code, sec. 1970. In all applications for partition, the court has a discretion to deny the writ where a sufficient reason appears: Code, sec. 4006; and that the applicant holds a deed for security only is a very potent reason for denying the petition, where it is not shown that some special cause exists for not using at once the appropriate statutory remedy expressly provided by the legislature in behalf of such a creditor. In this case no such cause appears, and we think the court erred in ordering the writ to issue.

Judgment reversed.

INFANTS — PROCESS. — Infants not personally served with process are not made parties to a proceeding merely by the appointment of a guardian *ad litem*, when the record exhibits no proof of acceptance by the guardian: *Shaefer v. Gates*, 2 B. Mon. 453; 38 Am. Dec. 164, and note. Compare *Sites v. Eldredge*, 45 N. J. Eq. 632; 14 Am. St. Rep. 769, and note. The service of process upon infants, when it is not shown that there is no father, mother, or guardian in the state upon whom process may be served, does not give the court jurisdiction as to such minors, or authorize the appointment of a guardian *ad litem*: *Frank v. Webb*, 67 Miss. 462.

PARTITION. — AS TO THE RIGHT OF A MORTGAGEE to compel partition, see note to *Nichols v. Nichols*, 67 Am. Dec. 708. A party who sells his interest in realty, and takes a mortgage to secure unpaid purchase-money, having assigned the mortgage, cannot maintain an action for partition: *Bannon v. Comegys*, 69 Md. 411. All parties interested as part owners must be made parties in a suit for partition: *Parker v. Chancellor*, 73 Tex. 475.

SCAIFE v. EMMONS.

[84 GEORGIA, 619.]

NUNCUPATIVE WILLS, ESSENTIALS TO VALIDITY OF. — Nuncupative wills demand strictness of proof in all essential points; and to be valid, must be executed by the testator while in *extremis*, as a matter of necessity and not of choice.

NUNCUPATIVE WILL, VALIDITY OF. — A nuncupative will executed by a testator in his last illness, and three days before his death, while he had time, opportunity, and ability to have executed a formal written will, and by which he gave nearly his entire property to his widow, to the exclusion of his children, is illegal and void.

Donalson and Hawes, and D. H. Pope, for the plaintiff.

Spence and Twitty, and I. A. Bush, for the defendants.

SIMMONS, J. Mrs. Margaret J. Emmons, now Mrs. Scaife, sought to have admitted and established as the will of her husband, Dr. H. R. Emmons, what she alleged to be a nuncupative will, made by him about the twentieth day of February, 1888, during his last illness, and three days before his death. By it he gave to his wife the house and lot on which they lived, and all the furniture and other property in it; also his farm, in Mitchell County, and the mules and other property on it; also the cabins and lots he had rented out to negroes; also his storehouse and lot in Camilla, and all the goods and other property therein. Indeed, he gave all his property to her except his wild lands. He left a son, Eugene, and a daughter, Minnie, who caveated the probate of the will on various grounds. The jury found for the caveators, and petitioner moved for a new trial, which was overruled by the court, and she excepted.

The main grounds relied on before us for a reversal of the judgment of the court below in refusing to grant a new trial were the third, fourth, and fifth, which are as follows: 3. Error in charging: "Nuncupative wills, being, as a rule, no favorites of the court, demand strictness of proof in all essential points; this is requisite in consideration of the facilities with which frauds in setting up nuncupative wills are obviously attended; facilities which absolutely require to be counteracted by courts insisting on the strictest proof as to the facts of such alleged wills." 4. Error in charging: "A nuncupative will, to be valid, must be made as a matter of necessity, and not as a matter of choice. That is, a person who desires to make a will, and has time to make a written will, but deliberately determines to make a nuncupative will, — such a nuncupative

will is not valid." 5. Error in charging: "Before the jury would be authorized to find in favor of the will, it must appear from the evidence that Dr. Emmons, the testator, was *in extremis* at the time of making the will; and the words 'last sickness,' as used in the statute of this state, mean last extremity. The extremity must be such that the party speaking them is overtaken by so sudden or violent a sickness, or at least alters his wishes so shortly before his death, that there is afforded thereafter no convenient time or opportunity to have reduced his words to writing and executed a formal will. If the jury believe, from all the evidence in the case, that the testator did have plenty of time and opportunity to have executed a formal written will, then it will be their duty to find against the nuncupative will."

There has been some conflict in the decisions of the courts upon the propositions announced to the jury by the trial judge in this case, as contained in the three grounds above set out. The supreme court of Alabama in the case of *Johnson v. Glasscock*, 2 Ala. 218, the supreme court of Illinois in the case of *Harrington v. Stees*, 82 Ill. 50, 25 Am. Rep. 290, and the supreme court of Tennessee in the case of *Nolan v. Gardner*, 7 Heisk. 215, held that it was unnecessary that the nuncupation should be made when the testator is *in extremis*. But we think that the great and decided weight of authority is in favor of the propositions announced by the trial judge, and complained of in the grounds of the motion for a new trial, above quoted. The reason for the rule is so well put in some of the cases in which this doctrine is discussed, that we deem it unnecessary for us to do more than refer to them: See *Prince v. Hazleton*, 20 Johns. 502; 11 Am. Dec. 307; *Yarnall's Will*, 4 Rawle, 46; 26 Am. Dec. 115; *Werkheiser v. Werkheiser*, 6 Watts & S. 184; *Boyer v. Frick*, 4 Watts & S. 357; notes to *Sykes v. Sykes*, 20 Am. Dec. 40; *Haus v. Palmer*, 21 Pa. St. 296; *O'Neill v. Smith*, 33 Md. 569; *Reese v. Hawthorn*, 10 Gratt. 548; *Carroll v. Bonham*, 42 N. J. Eq. 625; 26 Am. Law Reg. 568, with notes; 25 Cent. L. J. 328, with notes. See also Beach on Wills, 10; Schouler on Wills, sec. 365; 1 Redfield on Wills, 185. See also the opinions of Warner, J., and Lochrane, C. J., in *Ellington v. Dillard*, 42 Ga. 378 et seq.

Judgment affirmed.

NUNCUPATIVE WILLS, ESSENTIAL QUALITIES OF. — As to what constitutes a nuncupative will, see note to *Arnett v. Arnett*, 81 Am. Dec. 230, 231; *Sykes v. Sykes*, 2 Stew. 364; 20 Am. Dec. 40, and note 44-48; *Harrington v. Stees*, 82 Ill. 50; 25 Am. Rep. 290.

CLEMENTS v. STATE.

[84 GEORGIA, 660.]

CRIMINAL LAW — ROBBERY. — It is not necessary in a case of robbery to prove that the property was actually taken from the person of the owner, but it is sufficient if it is taken in his presence.

CRIMINAL LAW. — ROBBERY may be committed by taking the property of a person from his dwelling-house while he is confined in his smoke-house, fifteen steps from the dwelling, and where he is prevented, by threats and intimidation, from leaving the smoke-house and returning to the dwelling while the robbery is being perpetrated.

S. W. Hitch and J. H. Lumpkin, for the plaintiffs in error.

W. G. Brantley, solicitor-general, and D. W. Rountree and E. D. Graham, for the state.

SIMMONS, J. 1. William and Charles Clements were indicted, tried, and convicted of robbery. They made a motion for a new trial, upon several grounds, which was overruled by the court, and they excepted. The evidence as to the robbery was, in substance, as follows: Between seven and eight o'clock on the evening of January 19, 1888, Bird went into his smoke-house to weigh out rations for his hands. While he was in there, a man ran up and said that the first one who put his head out, he would shoot it off; said that they were after a murderer that had killed four men in Dooly County, and were told he was there. Bird asked what was his name, and the man said he did not know, but the sheriff did, and that the place was surrounded. Bird looked through the crack, the room being built of logs, and the man was standing with his face toward Bird, who could not tell anything about him only he was a stout man, and he stood in a shooting position. After a little while, the man disappeared, "kinder backed off," and Bird waited until he thought it was time for a man to come from anywhere around in fifty or sixty yards, and he did not come; and Bird said, "I am going out, if you do shoot," and went out. When he got to the back door, he met his wife coming in from the kitchen, and she asked him if he knew his chest was gone, and he told her, No. Before that man came up, a gun was fired off. The chest was right under the bed, which stood at the front door of Bird's dwelling-house. There was a piazza running along by the front door, and the chest had been taken out by that door. The smoke-house was "sorter back" of that house. The bed was from one and a half to two feet from the front piazza. The chest could have

been seen under the bedstead. It was under the bed when Bird went to the smoke-house. It contained, before it was broken open, several hundred dollars in currency, land deeds, and papers. He was alarmed or dazed by the statement made while he was in the smoke-house, by the man on the outside, who was standing within eight feet with his gun in a shooting position so he could not put his head out. The smoke-house was about fifteen steps from the dwelling-house. Nobody said anything to him about taking his money, and nobody took anything from his person. The chest was not very heavy. It was about eighteen inches long and about fourteen inches high. It was generally known that he kept his valuables in that chest. There was other evidence tending to show that the plaintiffs in error were the guilty parties; but it is unnecessary to detail it here, as the main question is, whether, under the facts set out, the offense was robbery.

Under the above-stated facts, the court charged the jury as complained of in the third and fourth grounds of the motion for a new trial, which is alleged by the plaintiffs in error to be erroneous. These grounds are as follows: 3. Because the court erred in the following charge to the jury: "In order to convict these defendants, it must appear that the goods alleged to have been taken were taken from the person of the owner. By this you are not to understand that the goods must have been in the hands of or attached to the person of the owner. All his property, so far as cases of this character are concerned, is, in contemplation of law, upon the person of the owner, which is, at the time of taking, in the immediate presence of the owner, or is so near at hand, or stored in such position, that at the time of taking it is under the immediate personal protection of the owner. If the goods are in that condition, then they are, within the contemplation of the law, upon the person of the owner." 4. Because the court gave the following charge: "That goods stored in the dwelling-house are deemed to be upon the person of the owner, in contemplation of law, so far as cases of this character are concerned, when the owner thereof is either personally therein, that is, in his dwelling-house, or in any house so nearly adjacent thereto as that the whole is under his immediate personal dominion and control. If you shall find from this evidence that in the county of Coffee, upon the day named in the indictment, the goods alleged to have been stolen were the property of Wiley Bird; that they were of some value; that they

were stored in the dwelling-house of the owner; that the owner thereof was present therein, or in a house so nearly adjacent thereto as that the same was under his immediate protection, dominion, and control; that the defendants, acting in concert, intending by violence or intimidation to take and carry away the goods described in the indictment, and by threats of violence putting him in fear within the meaning of that term as the court has defined it to you, and by this means overcame his will; and that while under the influence of such fears the other entered the dwelling-house of the owner, and took and carried away the goods described, with the intent to steal the same,—then it would be your duty to convict them, even though it should appear that at the exact moment of taking the owner had no knowledge that his goods were being taken, or of the purpose of the defendants in their putting him in fear.”

We do not think the court erred in giving the charges complained of, under the facts of this case. It is not necessary in a case of robbery to prove that the property was actually taken from the person of the owner, but it is sufficient if it is taken in his presence: *Crews and Crenshaw v. State*, 3 Cold. 350; *State v. Jenkins*, 36 Mo. 372; 2 Russell on Crimes, 106, 107; 2 Roscoe's Crim. Ev. 935, 936. In the present case, Bird, the prosecutor, was in his smoke-house, within fifteen steps of the dwelling-house, which contained the chest. All the property in this dwelling-house, in contemplation of law, was in his immediate possession and control. He was found by the defendants in this smoke-house, and was prevented by threats and intimidation from leaving the smoke-house and going into his dwelling-house. He was kept in the smoke-house a sufficient length of time to enable some of the defendants to enter the dwelling-house and take the chest therefrom. Suppose the defendants had found Bird on the front steps of his piazza, and had carried him by force to this smoke-house and locked him therein, and had then gone back to his house and stolen his chest; could it be said that the taking was not in his presence? Suppose they had found him in his dining-room, and, locking him therein, had gone to the front room and taken the chest; would not that have been in his presence? Suppose the owner of cattle is out in the pasture with them, when a man comes up and points a pistol at him, telling him to stay where he is. At the same time, confederates of the aggressor drive the cattle off from another part of the

field. Would not that be a taking in the presence of the owner? See 2 East P. C. 707. In the case of *State v. Calhoun*, 72 Iowa, 432, 2 Am. St. Rep. 252, lately decided by the supreme court of Iowa, the accused went into the dwelling-house of a lady and into the room where she was, and by violence and intimidation, throwing her down and tying her, extorted information as to where her valuables were. Being told that they were in another room, he left her tied, and went into the other room, where he got her money and watch. This was held to be a taking in the presence of the owner, notwithstanding it occurred in a different part of the house from that in which the owner was tied. Bishop, in his work on criminal law (vol. 2, sec. 1177), says: "The meaning of this legal phrase is, not that the taking must necessarily be from the actual contact of the body, but if it is from under the personal protection, that will suffice. Within this doctrine, the person may be deemed to protect all things belonging to the individual, within a distance, not easily defined, over which the influence of the personal presence extends." In the case of *Merriman v. The Hundred of Chippenham*, 2 East P. C. 709, it was held that where a wagoner was forcibly stopped in the highway by a man, under fraudulent pretense that his goods were unlawfully carried for want of a permit, and while they were going to a magistrate to obtain the permit, the man's confederates took away the goods, this was sufficient proof of a taking to constitute robbery. See also same case, quoted in 3 Greenl. Ev., sec. 228. So we think that where the prosecutor was within fifteen steps of the property stolen, and was kept away by threats and intimidation by one of the defendants, while the other stole the chest, the taking was in the presence of the prosecutor.

2. The verdict was found by the jury upon the proper count in the indictment, and the evidence authorized the finding.

Judgment affirmed. —

ROBBERY, WHAT CONSTITUTES. — To constitute robbery, the property taken need not be attached to the person of the individual robbed, or in his immediate presence: *State v. Calhoun*, 72 Iowa, 432; 2 Am. St. Rep. 252, and note.

LISSNER v. STATE.

[54 GEORGIA, 669.]

FORCIBLE ENTRY AND DETAINER — EVIDENCE. — An entry by one upon land in the possession of another, with such a show of force as to make it useless for the occupant to try to maintain his possession, is a forcible entry; and proof that the person so entering remained in possession is admissible to show that he made his entry complete and effectual, although he is not charged with forcible detainer.

INDICTMENT for and conviction of forcible entry and detainer.

Johnson, Smith, and Johnson, for the plaintiff in error.

W. G. Brantley, solicitor-general, and D. W. Rountree, C. Symmes, and J. H. Lumpkin, for the state.

BLECKLEY, C. J. 1. Though the grounds of the motion for a new trial are quite numerous, we think no substantial error was committed by the court, and that the evidence was sufficient to warrant the verdict. That the possession of the premises was in Wallace, the prosecutor, and that Lissner, the accused, entered with a show of force, and in opposition to the will of Wallace, cannot be doubted. Lissner went to the premises accompanied by two men, one of the latter carrying a hatchet. This hatchet Lissner took, and with it knocked off some slats which had been nailed across the door of a stable, announcing to Wallace his purpose to enter; and in answer to Wallace's remonstrances said: "I don't care what you say, I am coming in"; and he did come in by that means. Wallace made no resistance; and had he made any, it most probably would have been useless. The law did not require that he should make any in the face of such a display of force. That the force used was sufficient to constitute that element of the offense, see *Chambers v. Collier*, 4 Ga. 193; *Minor v. Duncan*, 54 Ga. 516.

2. The fact that Lissner remained in possession was admissible in evidence to show his purpose in making the entry, and to show, also, that he accomplished that purpose, and made his entry effectual. Although he was charged with forcible entry only, the completeness of his entry was illustrated by his retention of possession, and by the nature and extent of that possession.

3. No evidence material to the substantial merits of the case was either admitted or rejected erroneously by the court. And we are unable to discover any substantial error in the

instructions given to the jury. The same may be said as to the minute points of practice which arose, and which the court ruled upon in the progress of the trial. A more extended discussion of these matters would not be useful, as they involve no principle of any importance.

The court did not err in refusing to grant a new trial.

Judgment affirmed.

FORCIBLE ENTRY AND DETAINER. — To constitute the offense of forcible entry, there must be either actual violence used, or such demonstrations of force as are calculated to intimidate or alarm, or as involve or tend to a breach of the peace: *State v. Mills*, 104 N. C. 905; 17 Am. St. Rep. 706, and note; *State v. Smith*, 100 N. C. 466. If an entry upon land is peaceable, it may afterwards become forcible trespass; as where the trespasser, upon being ordered to leave the premises, used violent language, and pursued the occupant into his house: *State v. Talbot*, 97 N. C. 494.

ZELLNER v. MOBLEY.

[81 GEORGIA, 746.]

USURY AS DEFENSE. — Where a party has delivered cotton to a warehouseman, taking his receipt therefor, and has subsequently assigned such receipt to a third person to secure the payment of a usurious note, the holder of the receipt may maintain trover against the warehouseman to recover the cotton, after demand and refusal to deliver it. The holder of the receipt and the warehouseman are not privies, and the latter cannot set up the defense of usury, in the absence of proof that he claims the cotton under the maker of the note, or has an interest in it derived through him.

WAREHOUSEMEN — EFFECT OF DELIVERY OF RECEIPT. — The delivery of a warehouse receipt has the same effect in transferring the title to the property as the delivery of the property itself, and the warehouseman thereby becomes the bailee to the transferee.

USURY AS DEFENSE CAN ONLY BE TAKEN by a party to the usurious agreement, or persons representing him as privies in blood or estate. A stranger cannot set up usury as a defense to an action.

G. J. Wright, for the plaintiffs.

R. L. Berner and W. D. Stone, for the defendants.

SIMMONS, J. It appears from the record in this case that Watson carried two bales of cotton to the warehouse of Mobley, and stored them therein, taking the usual warehouse receipt therefor from Mobley. Subsequently, Watson borrowed ninety-one dollars from Head, giving his note therefor, payable on demand, with interest at the rate of twelve per cent per annum, and assigned, in writing, the warehouse receipt to

Head to secure the payment of said note. Head demanded the cotton of Mobley, and he refused to deliver it; whereupon Head brought his suit against Mobley and Maynard, alleging a conversion of the cotton by them. It appearing on the trial that the note given by Watson to Head, to secure which the cotton receipt was assigned to Head, was infected with usury, the court, upon motion of defendants' counsel, nonsuited the plaintiff, upon the ground that the title to the receipt was void and the plaintiff could not recover. To this decision the plaintiff excepted.

We think the court committed error in awarding a nonsuit upon that ground. Under our code, section 2244, when Watson assigned this receipt to Head, the assignment vested the title in Head; and when Watson delivered the receipt to Head, he thereby delivered possession of the cotton to Head. A warehouse receipt is not, in a technical sense, like a bill of exchange or a negotiable instrument; it merely stands in the place of the property it represents, and delivery of the receipt has the same effect in transferring the title to the property as the delivery of the property: *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419; 2 Am. Rep. 408. When by a warehouse receipt it is agreed to deliver the property to any one to whom the receipt may be indorsed (as to one or his order), symbolical delivery of the property may be effected by a transfer of the receipt, and the warehouseman in such case becomes the bailee to such transferee: *Gill v. Frank*, 12 Or. 507; 53 Am. Rep. 378; *Hale v. Milwaukee Dock Co.*, 29 Wis. 482; 9 Am. Rep. 603; *Allen v. Maury*, 66 Ala. 10; *Gibson v. Stevens*, 8 How. 384; Newmark on Sales, sec. 216. Head, then, being the owner of the receipt issued by Mobley, and being in possession of the cotton, Mobley became his bailee, and it was his duty to deliver the cotton to Head upon demand, unless he could show some legal reason for his refusal,—of which we will speak presently. A person having had possession of personal property has the right to recover it in an action on his possession, unless the defendant can show a better title. Head, being in possession of the property, as we have already shown, had a right to recover it from Mobley, unless Mobley had shown a better title in himself; but Mobley did not show any title in himself, nor undertake to do so, and therefore Head should have been allowed to recover the property or its value, and awarding a nonsuit was error.

Mobley insists, however, that Head's title to the cotton,

being infected with usury, was void, under our code, section 2057 f, which declares that "all titles to property, made as a part of a usurious contract, or to evade the laws against usury, are void." This would be true as between Head and Watson, or any other person in privity with Watson. This statute was enacted as a penalty against the usurer, and for the protection of the borrower or his privies in blood or estate; and all titles infected with usury are, as between the usurer and the borrower or his privies, void; and as between these persons, no court will give them validity. We cannot see, however, what right third persons who have no interest in the matter have to invoke this statute as against the usurer. It is a well-settled principle that the plea of usury is a personal one, and that no one can plead it but the borrower or his privies.

Mr. Tyler, in his work on usury, page 403, says: "As a general proposition, it may affirmed that no usurious transaction will be upheld by the court, and that in no instance can the holder of a usurious security succeed in a direct attempt to enforce it. But this is not the universal rule, and cannot be said to be correct under all circumstances and between all parties. The doctrine is well settled that the defense of usury can only be taken by a party to the usurious agreement, or persons representing him as privies in blood or estate. A stranger cannot set up usury as a defense to an action. . . . It is in all these cases the party who owes the debt, and who devotes his property to pay it, that can alone set up the defense of usury. If for any reason — his desire to avoid litigation, his pride of character, or his conscientious sense of justice — he may be induced to waive his legal rights and to satisfy a demand, he is at liberty to do so, although it may be obnoxious to the defense of usury. And whenever he sees fit not to set up the defense of usury against such a demand, and makes provision for its payment, no stranger, though he be agent or trustee, who, by express or implied agreement, has assumed the agency of making this payment on behalf of the debtor, who furnishes the funds for that purpose, can put the funds in his pocket and set the holder of the demand at defiance. These principles are well settled by a large number of authorities, a few of which need only be examined." See also Jones on Mortgages, sec. 644. A title may be absolutely void between certain persons and not void as between others. A fraudulent sale is void as to creditors; it would only be void-

able as between buyer and seller. "So it may be said that in many cases where a transaction is declared void in terms by a rule of the common law, or even expressly by statute, where the obvious intent of the rule or statute is to secure and protect the rights of others, the construction of law is, that it is voidable so far that it shall not operate to defeat or impair those rights. A deed of this character is not a dead letter, but can be avoided by the injured person only, and at such time and in such manner as may be necessary to preserve and secure those rights. In other respects, as we have seen, it has its natural effects": Wait on Fraudulent Conveyances, secs. 445 et seq. So while this title of Head was void on account of usury as between him and Watson and Watson's privies, it was not void as between Head and a third party not interested in the matter. A third party who has no interest in the title, as we have seen, will not be allowed to make the question. Watson and his privies alone can make the question that the title is void on account of usury. The record not disclosing that Mobley claimed under Watson, or that he had any interest in the cotton derived from Watson, we hold that he had no right to make the question as to Head's title being void, and that the nonsuit awarded on this ground was error.

Of course, if upon the next trial Mobley shows that he claimed the cotton under Watson, or that he had any interest in the cotton derived from Watson, he would be allowed to make the question so far as it would be necessary to protect that interest; and if Mobley shows this, and Maynard shows that he bought from Mobley, he would have the same rights that Mobley has. This case differs from *Jaques v. Stewart*, 81 Ga. 81. In that case Stewart and Jaques both claimed title under Gordon. This fact does not appear in the report, as it should, but it is in the record of the case, and the decision was predicated upon it.

Judgment reversed.

USURY AS A DEFENSE. — The defense of usury is a personal privilege, and if the debtor declines to avail himself thereof, no stranger can: *Ready v. Huebner*, 46 Wis. 792; 32 Am. Rep. 749; *Lamoille County Nat. Bank v. Bingham*, 50 Vt. 105; 28 Am. Rep. 490, and note 491-493; *Pritchett v. Mitchell*, 17 Kan. 355; 22 Am. Rep. 287, and note 290-293; note to *Davis v. Garr*, 55 Am. Dec. 398-400; *Barbour v. Tompkins*, 31 W. Va. 410; *Holladay v. Holladay*, 13 Or. 523; *Log Cabin etc. Ass'n v. Gross*, 71 Md. 456.

CASES
IN THE
SUPREME COURT
OF
IOWA.

TAYLOR v. TAYLOR.

[80 Iowa, 29.]

DIVORCE — DESERTION NOT JUSTIFIED BY LACK OF AFFECTION. — DIVORCE FOR WILLFUL DESERTION by the wife cannot be denied on the ground of lack of affection on the part of the husband for the wife.

DIVORCE. Judgment for defendant, and plaintiff appeals.

Woodward and Cook, for the appellant.

ROBINSON, J. Defendant was married to plaintiff on the fifteenth day of September, 1886, and on the eighth day of April, 1887, left him. The evidence shows, without conflict, that the desertion was willful, and without any cause recognized in law. It had continued more than two years when this action was commenced. She made no complaint of plaintiff, excepting that to one witness she stated that "she did not think the plaintiff loved her." Another witness testified that "there seemed to be no affection between them." However much the want of affection between the parties is to be deplored, it is not in law recognized as a sufficient ground for desertion: *Lane v. Lane*, 67 Iowa, 76. The cause which would justify the wife in leaving her husband is such as would authorize an action on her part for a divorce: *Pierce v. Pierce*, 33 Iowa, 240; *Appeal of Detrick*, 117 Pa. St. 452. The court should have granted the relief demanded.

Its judgment is therefore reversed.

DIVORCE — ABANDONMENT AND DESERTION AS A GROUND FOR DIVORCE: See *McVickar v. McVickar*, 46 N. J. Eq. 490; 19 Am. St. Rep. 422, and note 433, 434; *Lea v. Lea*, 99 Mass. 493; 96 Am. Dec. 772; *Cooper v. Cooper*, 17 Mich. 205; 97 Am. Dec. 182.

PENNYPACKER v. CAPITAL INSURANCE COMPANY.

[80 Iowa, 56.]

INSURANCE — VALIDITY OF POLICY ISSUED IN VIOLATION OF LAW. — A fire insurance policy issued by an insurance company organized under the laws of one state, upon property in another state, without a compliance with the laws of the latter state, providing that foreign insurance companies which issue policies on property in that state without complying with its laws are liable to a penalty, but imposing no duty or prohibition on the person so insured, is valid and binding on the company.

INSURANCE — EVIDENCE OF NOTICE AND PROOF OF LOSS. — In an action to recover on a fire insurance policy, the insured may show notice and proof of loss by evidence that he procured the policy through certain persons not agents of the insurer, that he mailed notice and proof of loss to them, and that they received and mailed them to the insurer.

INSURANCE — PRESUMPTION OF RECEIPT OF NOTICE AND PROOF OF LOSS. — Evidence of due mailing of notice and proof of loss properly addressed to the insurer raises a presumption that they were duly received by him, but such presumption may be overcome by evidence.

INSURANCE — NOTICE OF LOSS. — A condition in a policy of fire insurance that notice of loss must be given forthwith is synonymous with a condition that such notice must be given within a reasonable time.

INSURANCE — NOTICE AND PROOF OF LOSS. — **FINDING BY JURY** that notice and proof of loss were furnished the insurer within the time provided by the policy will not be disturbed when the evidence on that point is conflicting.

ACTION to recover upon a fire insurance policy issued by an Iowa corporation upon property in Pennsylvania. The insurance company in its answer alleged that it had not qualified, and was not, for want of capital stock, entitled to qualify, under the laws of Pennsylvania, to insure property in that state; that it had no office or agent there, and did not solicit or do business therein when the policy in question was issued, all of which the insured knew at that time; and that such policy was issued in violation of the laws of that state, and therefore void. The answer was demurred to on the ground that the insurer was estopped from setting up such matters in defense. The demurrer was sustained, and defendant excepted. At the close of the trial, judgment was rendered for plaintiff, and defendant appealed. The law of Pennsylvania as well as the other material facts are stated in the opinion.

Read and Read, and Phillips and Day, for the appellant.

Cummins and Wright, for the appellee.

GIVEN, J. 1. The questions raised and argued on the demurrer may be resolved into the single inquiry, Is the contract of insurance sued upon void? It is alleged that it is void be-

cause the defendant had not and was not entitled to qualify, under the laws of Pennsylvania, to contract insurance upon property in that state at the time this policy was issued, and because the plaintiff received it knowing that fact. For the purposes of the demurrer these allegations are to be taken as true, and we are to say whether, being true, they render the policy void. Appellant's contention is, that the contract was made and policy issued and accepted in violation of the laws of Pennsylvania, as set out in the answer, and that the plaintiff having received the policy, knowing that fact, the parties are *in pari delicto*, and the law will not enforce the contract at the suit of either. Appellee contends that the policy was issued and is payable in Iowa, and its validity is therefore to be determined by the laws of Iowa, and that the statute set out did not forbid the issuing the policy in suit, nor make the same void, but simply declares the company liable to a fine for issuing it.

2. It does not appear from the answer, nor from it and the petition, where the contract was made, premium paid, or policy delivered, nor where it is payable. From the facts that the company is of Iowa, and the insured property in Pennsylvania, we may infer the contract to have been made in either state as readily as the other. Such being the state of the pleadings, we are not called upon to determine what effect the law of Pennsylvania would have upon this policy as an Iowa contract.

3. The principle that contracts made in violation of law are void is too well established to require citations. "The well-settled general rule is, that when a statute prohibits or attaches a penalty to the doing of an act, the act is void, and will not be enforced, nor will the law assist one to recover money or property which he has expended in the unlawful execution of it. Or in other words, a penalty implies a prohibition, though there are no prohibitory words in the statute, and the prohibition makes the act illegal and void. . . . But notwithstanding this general rule, it must be apparent to every legal mind that when a statute annexes a penalty for the doing of an act it does not always imply such a prohibition as will render the act void": *Pangborn v. Westlake*, 36 Iowa, 548. The law of Pennsylvania, as set out, provides that no insurance company not of that state shall insure property therein, unless it has a certain amount of capital stock, has complied with certain requirements, and has obtained a certificate from the insurance

commissioner that it is qualified to do business in that state, and that any such company that shall do business in that state without having first qualified itself, and without first having received a certificate, as prescribed, from the insurance commissioner, "shall pay a fine and penalty for such offense." The evident purpose of such a law is the protection of those paying for insurance upon property in that state. The prohibition and penalty is against the company only. No duty is required of the insured, and no act upon his part expressly prohibited. There is nothing in the law declaring what effect it shall have upon policies issued and accepted as this is alleged to have been. A number of cases are cited by appellant where, in actions brought by the insurance company to enforce rights under the contract of insurance, it was held that statutes similar to that set out were prohibitory and the contracts void; but in none of those cases is it held that they are void as to the assured. *The Manistee*, 5 Biss. 382, is a case wherein the statute of Illinois was under consideration. That statute required foreign insurance companies to produce certain statements, and to procure authority from the auditor of state to transact business within the state, and declared it unlawful for any agent to do business without having first complied with those laws. It was provided that upon conviction for violating these requirements punishment by fine or imprisonment, or both, may be imposed. The court says: "Those statute laws do not declare void policies issued by foreign companies, through a local agent, in disregard or violation of them. The object of these statutes was for the security of citizens doing business with such companies, by bringing them as near as possible to local corporations, and also as a provision for revenue. Where a statute prohibits or annexes a penalty to its commission, the act is made unlawful; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. Where a statute is silent, and contains nothing from which the contrary can properly be inferred, a contract in contravention of it is void. But the whole statute must be examined, in order to decide whether or not it does contain anything from which the contrary can be properly inferred. There is no penalty pronounced against a person for obtaining a policy from or doing business with the company that has not complied with the requirements of those statutes." *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67, is somewhat in point. That was an

action upon a policy of life insurance issued by the plaintiff in error. The company claimed that its failure to comply with a statute similar to that under consideration rendered the policy void. The court says: "Whether the statute was meant to invalidate policies issued by companies in contravention of its provisions, is to be determined from a consideration of the statute as a whole. The object of the act is not to make the business of life insurance unlawful. The statute is designed for the protection of policy-holders and others dealing with insurance companies. To this end, it is made unlawful for persons to act on behalf of such companies until the provisions of the statute have been complied with. But we do not think it was intended to devolve on persons dealing with the companies, the duty and risk of ascertaining whether they had complied with the statute. On the contrary, it seems to have been the intention of the legislature to rely on the penalties imposed as sufficient to insure such compliance." In *Pangborn v. Westlake*, 36 Iowa, 548, the question was, whether a contract for the sale of a lot in a plat that had not been recorded was void because of the statute providing that any person who shall dispose of or offer for sale any lot in any town or addition, until the plat was acknowledged and recorded, shall forfeit fifty dollars for each lot sold or disposed of. This statute is similar in several respects to that in question. It is quite as prohibitory. It is addressed to the seller alone. It is for the protection of the purchasers, and imposes no duty upon or prohibition against them. In passing upon the question, this court said: "We are therefore brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition, or to render the prohibited act void, the courts will so hold, and construe the statute accordingly." See also *Hill v. Smith*, 1 Morris, 70; *Tootle v. Taylor*, 64 Iowa, 629. It is argued that to hold this contract not prohibited is to defeat the purposes of the law; that it will admit foreign companies to do business, subject only to such fines as may be assessed. In view of the language of the law as stated, the absence of express prohibition, and the evident purpose to protect the insured, we are clearly of the opinion that it was not intended to render contracts such as

that in suit void. To so hold does not necessarily admit foreign companies to do business in that state in disregard of its laws. The power of the courts is ample to compel, by fine and otherwise, compliance with the law of the state. The contract being valid, the matter demurred to is no defense, and the question of estoppel does not arise. We think the demurrer was properly sustained.

4. On the trial, the plaintiff was permitted to testify that he received the policy through Rhem and Van Deinse, of Indianapolis, Indiana; that he sent notice by mail, and proofs of loss, to them; and that after sixty days he drew on the defendant, and the draft was returned protested. Anton J. Van Deinse was also permitted to testify, over defendant's objection, to the receipt of the notice and proofs of loss from the plaintiff, and that they were forwarded by mail to the defendant. While it is true that Rhem and Van Deinse were not the agents of the defendant, yet this testimony only tended to show how and when the notice and proofs were transmitted, and was properly admitted, if such notice and proofs may be given in the manner stated. That they were transmitted through Rhem and Van Deinse is immaterial, except as it tends to show whether the defendant received them, and when.

5. The court instructed the jury that if Van Deinse mailed the notice and proofs of loss, properly addressed, to the defendant, the presumption is, that they were duly received, but that this presumption may be overcome by evidence. Appellant concedes that such is the rule as to the notice, but contends that as the plaintiff had sixty days in which to furnish proofs of loss, he should be held to proof of their actual delivery. We see no reason for the distinction. The plaintiff was under the same obligation to furnish both. *Hodgkins v. Montgomery Co. Ins. Co.*, 34 Barb. 213, is relied upon. That case is not in point, as it turned upon certain express provisions in the policy not found in this. The court instructed the jury that they must find that the notice of the loss was given within a reasonable time. Appellant contends that this was erroneous, as the policy requires that it be given forthwith. We think the terms are so nearly synonymous that no prejudice could have resulted therefrom. We see no error in the instructions in either of the respects alleged. Some objection is made to the sufficiency of the proofs of loss claimed to have been forwarded; but as no such objection appears to

have been made in the lower court, it cannot be considered here.

6. In addition to the alleged errors already considered, it is urged that the court erred in not granting a new trial, on the grounds that the verdict is not supported by the testimony, and that the special finding was not properly answered. The fact in question was, whether the notice and proofs of loss had been furnished as required. For the plaintiff, there was the testimony of Van Deinse as to addressing, stamping, and mailing them, and the presumption that arises therefrom. Against this, there was the testimony of the defendant's officers and clerks, who received its mail, that no such documents were received. It was properly left to the jury to say whether the documents were received, and they have found that they were. There is surely evidence upon which to so find, and therefore the verdict should not be disturbed on that ground. The special finding was answered as definitely as it could be under the testimony. There was nothing from which to fix the precise day upon which the proofs of loss were received, except as it might be inferred from the time and place they were mailed. It was important to decide whether they were received within the sixty days, and this the jury could and did find as a fact from the testimony. They could not have found with the same certainty the precise day, nor was it material that they should.

Our conclusion is, that the judgment of the district court should be affirmed.

INSURANCE. — Where a contract of insurance was made with a resident of New Hampshire, and upon property situated there, by a Massachusetts company, which had not complied, in New Hampshire, with the obligations and requirements imposed by law, it was held that an action upon a premium note could not be maintained, as the contract of insurance was invalid: *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547; 80 Am. Dec. 123; and to the same effect is *Cincinnati Mut. etc. Assur. Co. v. Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626. However, the presumption is, that a foreign insurance company has complied with the laws of the state in which it has effected insurance: *Fitzsimmons v. City Fire Ins. Co.*, 18 Wis. 234; 86 Am. Dec. 761.

In *Morton v. Hart*, 88 Tenn. 427, it was decided that an insurance agent who takes out an insurance policy in Tennessee for a foreign company doing business unlawfully, by reason of its not having complied with the law respecting insurance, becomes personally responsible to the assured.

PRESUMPTION — MAILING A LETTER. — A letter properly addressed and mailed is presumed to have been received by him to whom it was directed: *Phelan v. Northwestern L. Ins. Co.*, 113 N. Y. 147; 10 Am. St. Rep. 441, and note.

INSURANCE. — As to the time when notice of loss must be given, see *Gon'd v. Dwelling-house Ins. Co.*, 134 Pa. St. 570; 19 Am. St. Rep. 717, and cases cited in note. A condition in the policy for notice of loss to be furnished "forthwith" must be construed liberally in the favor of the assured, and means without any unnecessary delay: *Central City Ins. Co. v. Oates*, 86 Ala. 558; 11 Am. St. Rep. 67. Compare *People's Mut. Acc. Ass'n v. Smith*, 126 Pa. St. 317; 12 Am. St. Rep. 870.

STATE v. LEE.

[80 IOWA, 75.]

CRIMINAL LAW — REPUTATION OF HOUSE OF ILL-FAME — EVIDENCE OF REPUTATION. — On the trial under an indictment for keeping a house of ill-fame, the statements and declarations of traveling men who frequently visit the city where the house is situated is competent evidence, as tending to establish the general reputation of the house.

CRIMINAL LAW — HOUSE OF ILL-FAME — EVIDENCE OF REPUTATION. — On the prosecution of an indictment for keeping a house of ill-fame, where witnesses have testified that such house did not have the reputation of being a house of ill-fame, they may be asked on cross-examination, for the purpose of showing that their occupation, habits, interests, and relations were not such that they would be apt to know of its reputation, whether they were married, had sons old enough to visit houses of ill-fame, what interest they had in such houses or lewd women, and whether they had talked with others in regard to such houses.

CRIMINAL LAW — HOUSE OF ILL-FAME — CONSTRUCTION OF HOUSE. — On the prosecution of an indictment for keeping a house of ill-fame, where it is shown that the building consists of two stories, the rooms on the first floor of which were used for saloon, gambling, and other purposes, while the rooms on the second floor were used for drinking and gambling purposes, and one as a sleeping apartment, and the rooms on both floors had direct communication with each other, and were all used together for the purpose of carrying on the same business, and all frequented by men and women of lewd character, the prosecution cannot be compelled to elect as to which story of the house it will charge as being the house of ill-fame.

CRIMINAL LAW — HOUSE OF ILL-FAME — EVIDENCE OF PROFIT. — On the prosecution of an indictment for keeping a house of ill-fame, proof that the house was kept for the purposes of gain is not necessary, as the statute does not make that an element of the crime.

CRIMINAL LAW — HOUSE OF ILL-FAME. — Indictment for keeping a house of ill-fame is sustained by proof that it was kept by defendant as a house of ill-fame, and resorted to for purposes of prostitution, without proof of its general bad reputation.

CRIMINAL LAW — HOUSE OF ILL-FAME, WHAT CONSTITUTES. — To constitute a house of ill-fame, it must be resorted to more than once for the purpose of prostitution and lewdness by others than the proprietor, though it need not be used habitually, or for any considerable length of time for such purpose. Any number of illicit acts with the proprietor will not make the place a house of ill-fame.

CRIMINAL LAW — SUFFICIENCY OF VERDICT. — A verdict that "we, the jury in the case of *State of Iowa v. Harry Lee*, the defendant guilty as charged in the indictment," omitting the word "find," is not fatally defective under a statute providing that the general verdict, on the plea of not guilty, is either "guilty" or "not guilty."

NEW TRIAL — INTOXICATION OF JUROR. — Motion for a new trial on the ground of intoxication of a juror during the trial will not be sustained when the evidence on that point is conflicting and equally balanced.

CRIMINAL LAW — NEW TRIAL. — NEWLY DISCOVERED EVIDENCE is not ground for a new trial in criminal cases.

Hayes and Schuyler, for the appellant.

John Y. Stone, attorney-general, and *A. R. McCoy*, county attorney, for the state.

ROBINSON, J. The indictment charges that the alleged crime was committed in Clinton County, as follows: "The said Harry Lee, on the twenty-fifth day of April, A. D. 1887, in the county aforesaid, did unlawfully and feloniously keep a house of ill-fame, resorted to by divers persons to the grand jury unknown, for the purpose of prostitution and lewdness." The defendant, at the time in question, occupied the first and a part of the second floor of a building in the city of Clinton. The two floors were connected by means of outside stairways. The front room of the first floor was used as a billiard-hall, and the back room on the same floor was used as a saloon. From that a small room was partitioned off, which was used for various purposes connected with the business. The part of the second floor occupied by defendant comprised two rooms, one of which was used for drinking and gaming purposes, and the other was furnished and occupied as a bedroom by an employee of defendant. The evidence tends to show that the saloon and upper rooms occupied by defendant were resorted to by men and women of lewd character.

1. Several witnesses for the state testified that the general reputation of the place was that of a house of ill-fame. On cross-examination, some of them stated that among those who had spoken of the place in their hearing were traveling men, who did not reside in Clinton. Defendant objected to testimony as to the statements of such men, on the ground that they were not competent to make statements upon which the reputation of the place could be to any extent founded. But we think the testimony in question was competent. Traveling men who frequently visit a city may acquire as reliable information in regard to places of business, and the nature of

the business transacted therein, as that possessed by its citizens. Many traveling men are required, by the nature and purpose of their employment, to investigate the habits of business men, and the business in which they are engaged. The value of their statements would depend upon their means of obtaining accurate knowledge, and that would be a proper matter for the consideration of the jury; but their statements might be proper for the witness to take into account in stating the general reputation of the person or place to which they referred.

2. The defendant introduced a number of witnesses, who testified, in effect, that the place of defendant did not have the reputation of being a house of ill-fame at the time in question. On cross-examination, they were asked whether they were married men; what interest they had in lewd women and houses of ill-fame; whether they had sons old enough to visit such places; whether they had talked with others in regard to such houses; and similar questions. The questions asked were designed to test the means of knowledge of the witnesses, and it was intended to show by the answers that their occupations, habits, interests, and relations were such that they would not be apt to hear the character of the defendant's place of business discussed. We think questions of that kind were proper, within reasonable limits, for the purpose stated, and we find no error in allowing those of which complaint is made.

3. During the progress of the trial, defendant asked that the state be compelled to elect whether to proceed on the theory that the house of ill-fame in question was located in the first story of the building occupied by defendant, or in the second story. But one act of sexual intercourse was proven, and that occurred in the small room adjoining the saloon, in the first story. The evidence tended to show that the rooms of defendant in both stories were frequented by men and women of lewd character; but the appellant contends that there was no internal communication between the two stories, and therefore, for the purposes of this case, they should have been treated as distinct buildings. It is true, the rooms of defendant were used ostensibly for different purposes; but all were so used, and the business carried on in each was so related to the business carried on in the others, that all the rooms were really occupied together for the purposes of carrying on a business which was subdivided into branches. The rooms in the sec-

ond story occupied by defendant was accessible from the first story by means of a covered stairway, used specially by defendant and the frequenters of his place of business. There was also an elevator, by means of which liquor and other articles were sent from the saloon to the rooms of defendant in the second story, thus affording direct internal communication between the various rooms in the two stories used by defendant. It is clear that these rooms were properly treated as constituting but one building, and that the court rightly refused to compel the state to make the election demanded.

4. It is objected by appellant that the state failed to show that he kept the place in question as a house of ill-fame for the purpose of gain; but the statute does not make that a necessary element of the crime, and it was not necessary to prove it: 1 Bishop's Crim. Law, sec. 1038.

5. The evidence in regard to the general reputation of the place in question was conflicting. A majority of the witnesses who testified in regard to it said, in effect, that it did not have the reputation of being a house of ill-fame, and appellant contends that the bad reputation of the place was not established by a great preponderance of the evidence. The court instructed the jury, in effect, that it was not necessary to prove that the general reputation of the place was bad, if the testimony showed that it was in fact a house of ill-fame. Appellant insists that the court erred in so instructing the jury, and relies upon the case of *State v. Haberle*, 72 Iowa, 139, as supporting his claim. The question thus presented is, whether the statute is violated by the keeping of a house which is resorted to for the purpose of prostitution or lewdness, but which is not generally reputed to be a house of that character. The object of the statute is, not to protect the reputation of the house, but to cherish and promote good morals: 1 Bishop's Crim. Law, secs. 665, 947, 1038; *Commonwealth v. Lambert*, 12 Allen, 179. The evil influence of a bawdy-house is not necessarily measured by its reputation in the community where it exists. It was said in the case of *State v. Lyon*, 39 Iowa, 379, that evidence to prove the general reputation of the house for prostitution and lewdness was properly excluded; that the house gets its character from that of the inmates and those who resort to it, and that evidence that such persons are of bad character is competent to establish the bad character of the house. It is true that was a case of prosecution for the crime of leasing a house for the

purposes of prostitution and lewdness; but what was therein said in regard to proving the general reputation of the house was applicable to prosecutions of this kind under section 4013 of the code as it then existed. Chapter 142 of the Acts of the Twentieth General Assembly repealed that section, and enacted a substitute therefor, but the change thereby made relates only to the punishment, the new statute using the language of the old in describing the offense. Section 4 of the act of 1884 referred to is as follows: "The state upon the trial of any person indicted for keeping a house of ill-fame, may, for the purpose of establishing the character of the house kept by defendant, introduce evidence of the general reputation of such house as so kept, and such evidence shall be competent for such purpose." In our opinion, this section was not designed to add to the ingredients of the crime by requiring that the house should be generally reputed to be a house of ill-fame, but to enlarge the means of proving its true character. Evidence of the general reputation of the house is made competent but not conclusive means of proving its character. Nothing more than that was involved in the instruction approved by this court in *State v. Haberle*, 72 Iowa, 139. That case involved the constitutionality of the act of the twentieth general assembly already referred to. It was claimed that under that act a person charged with the crime in question might be convicted by merely proving the reputation of the house he kept. This court held that the statute did not authorize a conviction upon proof of reputation alone, but that it must be shown that the house was resorted to for the purpose of prostitution or lewdness. Whatever is said in the opinion in that case as to the necessity of proof of the general reputation of the house should be regarded as argumentative, rather than as a holding that such proof is absolutely essential to a conviction. As is said in the instruction which was approved, it is "competent for the consideration of the jury as a circumstance in the case." "Bawdy-houses" and "houses of ill-fame" are synonymous terms: 1 Bouvier's Law Dict. 163; *State v. Smith*, 29 Minn. 193; *State v. Boardman*, 64 Me. 529; *Henson v. State*, 62 Md. 231; 50 Am. Rep. 204.

In *State v. Smith*, 29 Minn. 193, it was said: "The term 'house of ill-fame' is, no doubt, a mere synonym for 'bawdy-house,' having no reference to the fame of the place, but denoting the fact." The gist of the offense is the keeping and

use of the house for the purposes of prostitution and lewdness, and not its reputation: *Henson v. State*, 62 Md. 231; 50 Am. Rep. 204; *State v. Boardman*, 64 Me. 529. We are aware that some authorities hold that proof of the reputation of the house is necessary. It was so held in *Cadwell v. State*, 17 Conn. 467, under a statute similar to that of this state. In *State v. Brunell*, 29 Wis. 436, the court condemned an instruction to the effect that if the defendant was the keeper of the house in question during any part of the time covered by the indictment, and "during that time the reputation of the house was that of a house of ill-fame," then the defendant was guilty. It was not said that it must be proved that the reputation of the house was that of a house of ill-fame, but "that the house in question was a 'house of ill-fame, resorted to for the purposes of public prostitution or lewdness,' or, what is the same thing, that it was a common bawdy-house." It was also said that evidence of the general reputation of the house was admissible as tending to show its real character.

In *Drake v. State*, 14 Neb. 535, the court used language in harmony with the opinion in *Cadwell v. State*, 17 Conn. 467; but whether it was necessary to prove that the reputation of the house was that of a house of prostitution was a question apparently not involved in the case, and not directly considered. The language referred to was used in reference to a point made by appellant that the evil character of the house should have been established by proof of facts, and not by its reputation alone. The court said it was necessary to prove that the house "was really a house of ill-fame, a house resorted to for acts of prostitution," even though it was conceded that defendant was the owner of the house, and knew of the use to which it was put, and that its reputation was that of a house of ill-fame. It was also said that evidence of the general reputation of the house was competent to establish its character.

In view of the general purpose of the statute, and the decisions of this court prior to the amendment of 1884, we conclude that it was not necessary, in order to convict the defendant, to prove that the general reputation of the place in question was that of a house of ill-fame. In *State v. Hand*, 7 Iowa, 412, 71 Am. Dec. 453, the court noted the fact that the counsel for defendant admitted that the character of the house might be shown by proving its reputation, and apparently approved the admission, but the point was not fully

decided. In *State v. Lyon*, 39 Iowa, 379, the court referred to the case of *State v. Hand*, 7 Iowa, 412, 71 Am. Dec. 453, although it decided that the character of the house could not be shown by proving its general reputation. It is probable that section 4 of chapter 142 of the Acts of the Twentieth General Assembly was enacted to settle the practice and facilitate proof of the crime. Proof of the character of the house is not alone sufficient. It must be shown, also, that it was resorted to for the purpose of prostitution or lewdness, and that it was kept by defendant, within the meaning of the statute.

6. The appellant complains that the charge to the jury was not sufficiently full, in that it did not require the jury to find that the place in question was one of resort for the purposes specified by the state. We think the charge, as a whole, properly instructed the jury that in order to find the defendant guilty they must find that the place in question was resorted to for the purpose of prostitution or lewdness. It informed the jury, also, that a single act of illicit intercourse in the house, or any number of acts with the proprietor alone, would not make the place a house of ill-fame, but that it must have been used for that purpose more than once by others than the proprietor. The statute does not require that the place be used habitually, or for any considerable length of time, for the prohibited purposes, in order to constitute the offense in question.

7. The verdict of the jury was in the following form: "We, the jury in the case of *State of Iowa v. Harry Lee*, the defendant guilty as charged in the indictment." The appellant insists that the verdict is fatally defective, for the reason that the word "find" is omitted therefrom. The court charged the jury as to the form of their verdict, as follows: "If you find the defendant guilty, the form of your verdict will be, 'We, the jury, find the defendant guilty as charged in the indictment.' If you find the defendant not guilty, you will say so; and in either event, let your verdict be in writing, and signed by one of your number as foreman." Section 4464 of the code provides that the general verdict on the plea of not guilty is either "guilty" or "not guilty," and that such a verdict imports a conviction or acquittal on every essential allegation in the indictment. The verdict returned said, "Guilty as charged in the indictment," and when it is considered in connection with the instruction as to its form, there

is no room for doubt as to the intention of the jury. The verdict is therefore sufficient.

8. After the verdict was given, defendant filed a motion in arrest of judgment and for a new trial. One of the grounds of the motion was, that a juror drank intoxicating liquor and was intoxicated during the trial. It was supported by the affidavit of defendant, and was contradicted by the affidavit of the juror. We cannot say that the court erred in overruling the motion on that ground: *State v. Kennedy*, 77 Iowa, 213. Another ground of the motion was, that evidence material for the defense had been discovered since the trial. That ground is not recognized by the statute in criminal cases: Code, sec. 4489; *State v. Bowman*, 45 Iowa, 421.

9. We have considered all the questions discussed by counsel, and find no error prejudicial to defendant.

The judgment of the district court is therefore affirmed.

HOUSE OF ILL-FAME, WHAT IS. — As to what constitutes the offense of keeping a house of ill-fame, see *Beard v. State*, 71 Md. 275; 17 Am. St. Rep. 536, and note; *State v. Calley*, 104 N. C. 858; 17 Am. St. Rep. 704, and note. A woman submitting to indiscriminate sexual intercourse, which she solicits by any act of her own, is a prostitute, no matter whether she receives compensation or not: *State v. Clark*, 78 Iowa, 492.

HOUSE OF ILL-FAME, WHAT EVIDENCE IS ADMISSIBLE TO PROVE THE OFFENSE OF MAINTAINING: See *Beard v. State*, 71 Md. 275; 17 Am. St. Rep. 536, and note. Where the evidence tends to show that defendant's house was frequented by lewd women, who received visits while there from various men, although there is no direct evidence of any lewd practices upon the premises, the jury are justified in finding a verdict of guilty: *State v. Schaffer*, 74 Iowa, 705. The character of a house, as being one of ill-fame, cannot be shown by general reputation, but must be proved by particular facts: *Kenyon v. People*, 26 N. Y. 203; 84 Am. Dec. 177; *Handy v. State*, 63 Miss. 207; 56 Am. Rep. 303, and foot-note.

LAIDLEY v. AIKIN.

[80 IOWA, 112.]

JUDGMENT LIEN, MORTGAGE FOR PURCHASE-MONEY SUPERIOR TO. — Where the purchaser, at the time he receives an absolute conveyance, executes a mortgage on the land to a third person, who advances the purchase-money for him, which is paid directly to the vendor, and this is all done as part of the same transaction, the lien of the mortgage is superior to that of a prior judgment recovered against such purchaser.

FORECLOSURE of mortgages on real estate. One McCall, who was a party defendant, was the owner of a judgment against

defendant Aikin, which he claimed was a lien superior to the mortgages. Judgment for plaintiff, and McCall appealed.

A. W. C. Weeks, for the appellant.

V. Wainwright, for the appellee.

ROTHROCK, C. J. The record shows that on the twenty-second day of June, 1881, the defendant Mary E. Aikin made a contract with T. C. Gilpin for the purchase of eighty acres of land. She paid Gilpin two hundred dollars in cash, and for the balance of the purchase-money she gave him her four promissory notes, payable at different dates. The last note became due July 1, 1884. The whole consideration agreed to be paid for the land was \$1,168.50. Gilpin executed to said Mary E. Aikin a title bond, by which he agreed to make conveyance of the land upon payment of the purchase-money. On the fifth day of February, 1884, Gilpin made a deed of the land to Mrs. Aikin, and on the same day she made a mortgage thereon to Justus B. Johnson for \$800, and another mortgage, to Joshua Aikin, for \$450. The deed and the mortgages were all filed for record on the fifteenth day of February, 1884, and, so far as appears, at the same time, except that it is recited in the mortgage to Joshua Aikin that it is subject to the mortgage to Johnson. Both mortgages are now owned by the plaintiff herein. On the eleventh day of April, 1882, the defendant McCall recovered a judgment against Mary E. Aikin for \$346, and for costs and attorney's fees. The question to be determined is, whether the mortgage liens are prior and superior to the lien of the judgment.

It appears from the evidence in the case that T. C. Gilpin is an attorney and loan broker, and that he had been placing loans upon real estate for the mortgagee Johnson, who is a resident of the state of New York. This loan from Johnson was negotiated in the usual way, and the money realized from the loan was paid directly to Gilpin as a part of the purchase-money of the land. Aikin made his loan to pay the balance of the purchase-money, and the money was paid to Gilpin. If Mary E. Aikin had borrowed the money of the mortgagees as an independent transaction, and without reference to her indebtedness for the land, and executed the mortgages, it may be that the judgment would be a prior lien. But the borrowing of the money and the making of the deed and mortgages were all parts of the same transaction. The fact is, Mrs. Aikin

did not receive any of the money. It was applied directly to the payment of the purchase-money. If the mortgages had been given to Gilpin, there can be no question that they would have been liens prior to the judgment; and it is a well-settled equitable rule that where a purchaser of land, at the time he receives the conveyance, executes a mortgage to a third person, who advances the purchase-money for him, such mortgage is entitled to the same preference over a prior judgment as it would have had if it had been executed to the vendor himself. This is the rule announced in *Kaiser v. Lembeck*, 55 Iowa, 244, and in the cases therein cited. It is not essential that there should be a prior agreement between the parties to give the mortgages priority. No such condition is necessary. When all the acts of the parties appear to be parts of one transaction, "in its legal effect it is the same as though the purchaser had executed a mortgage to the vendor for the purchase-money, and he had assigned it to the party advancing the money": *Haywood v. Nooney*, 3 Barb. 645. And the fact that Gilpin had previously contracted to convey the land does not affect the right of the parties. The money loaned by the mortgagees was applied in payment of the purchase-money, just the same as it would have been if the contract of purchase had been made at the same time that the deed and mortgages were given.

We think the decree of the district court should be affirmed.

MORTGAGE FOR PURCHASE-MONEY. — A mortgage given for the residue of purchase-money, bearing even date with the conveyance to the mortgagor, has precedence over the lien of a judgment recovered against him prior to the conveyance: *Cake's Appeal*, 23 Pa. St. 186; 62 Am. Dec. 328. Where a vendee of land on the same day gave a mortgage for purchase-money to the vendor, and another mortgage to another person, before the delivery of the deed, to obtain money to make a cash payment on the purchase, both mortgages being recorded on the same day, the former has priority: *Turk v. Funk*, 68 Mo. 18; 30 Am. Rep. 771. A mortgage for purchase-money has superiority over mechanics' liens: *Rees v. Ludington*, 13 Wis. 276; 80 Am. Dec. 741, and note.

HOLLINGSWORTH v. HOLBROOK.

[80 IOWA, 151.]

CHATTEL MORTGAGE — FRAUDULENT ALTERATION BY MORTGAGEE'S AGENT. —

The fraudulent and material alteration of a chattel mortgage by the agent of the mortgagee, before possession is delivered to the latter, by inserting in the mortgage a description of property not conveyed or intended to be conveyed, avoids the mortgage, and prevents foreclosure in the hands of the mortgagee, when the agent was not restricted by the terms of his agency as to the security he might take. In such case it is immaterial that the fraudulent alteration was not authorized by or known to the mortgagee, if not expressly forbidden, and it was in the line of the agent's agency, and because of it.

INSTRUCTIONS, OMISSION OF, WHEN NOT ERROR. — Where instructions are given as to all issues raised by the pleadings about which there is any dispute, no prejudice results from the omission to instruct in regard to a defense technically presented by a general denial.

R. M. Wright, for the appellants.

ROBINSON, J. The petition alleges that plaintiff is the owner of a Buckeye power and grinder, a Hocking Valley corn-sheller, one cow, and a "two-and-one-half-inch Studebaker wagon," and entitled to the immediate possession thereof; that the property described was wrongfully taken from his possession by defendant John Holbrook, by direction of defendant B. M. Halstead, under a pretended chattel mortgage purporting to have been executed by plaintiff, and is wrongfully detained by them; that the pretended mortgage was never executed by plaintiff, and is a forgery, and void. Judgment for the property is demanded. The answer contains a general denial, modified by the admission that the property described in the petition was detained by defendants when the suit was brought, and that it was taken by defendants, at the time alleged, under a chattel mortgage executed by plaintiff to one H. F. Halstead, and owned by defendant B. M. Halstead. For a second defense, the answer alleges that on the twenty-third day of April, 1888, plaintiff, being indebted to said B. M. Halstead, made to H. F. Halstead his promissory note, and a chattel mortgage to secure the same, which covered the property described in the petition; that after the maturity of the note it was wholly unpaid, and was delivered with the mortgage to defendant Holbrook for collection; that the property was taken for the purpose of foreclosing the mortgage, and held until the commencement of this action; and that the interest of defendants in the property is measured by the amount due on the mortgage debt, and cer-

tain costs which accrued in the attempted foreclosure. For a further defense, the answer avers that the mortgage was made to H. F. Halstead, but for the use and benefit of defendant B. M. Halstead, and that the indebtedness secured thereby is *bona fide*, and wholly unpaid; that if, after the execution of the mortgage, it was in any manner altered, the alteration was the work of a stranger, and was a mere spoliation, and in no manner affected the validity of the instrument. The reply admits that plaintiff executed a chattel mortgage to H. F. Halstead on the date named, which included the property described in the petition, excepting the wagon, but alleges that, after it was delivered, it was fraudulently altered, without the knowledge or consent and against the will of plaintiff, by the insertion of the description of the wagon; that the alteration was made, as plaintiff believes, by one D. W. Halstead, who, as agent for the mortgagee, drew and accepted the mortgage; that plaintiff never knew of nor assented to the alteration; that it was fraudulent, and made for the purpose and with the intent to defraud; and that it rendered the mortgage void. Other averments of the pleadings need not be set out.

1. There was evidence which authorized the jury to find that the description of the wagon was inserted in the mortgage in controversy after it was executed and delivered, without the knowledge of the plaintiff; that he has never assented to nor ratified the alteration; and that as to him it was fraudulent. But appellant contends that the estate created by the mortgage could have been conveyed without it; hence that although the fraudulent alteration of the mortgage after delivery may have had the effect to destroy the instrument, yet it did not operate to reinvest the plaintiff with the estate which had been transferred to the mortgagee. The authorities are not entirely in harmony as to the effect which should be given to the fraudulent alteration of an instrument of conveyance. Where such an instrument has fully accomplished the purpose for which it was executed before the alteration was made, we think the interest it transferred would not be affected by it: *Woods v. Hilderbrand*, 46 Mo. 284; 2 Am. Rep. 513; *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67; 1 Am. & Eng. Ency. of Law, 502; 1 Greenl. Ev., sec. 568; *Chessman v. Whittemore*, 23 Pick. 231; *Kendall v. Kendall*, 12 Allen, 92. But the authorities recognize a difference between covenants which are executed and those which are executory. A fraudulent and material alteration of an instrument of conveyance will destroy

the right of recovery on its executory covenants. In this case the mortgage conveyed to the mortgagee an interest in the property described in the mortgage at the time of its delivery, and the right to the possession thereof: *Gordon v. Hardin*, 33 Iowa, 550; Code, sec. 1927. But the interest thus acquired was not the unqualified and absolute ownership: *Kern v. Wilson*, 73 Iowa, 490. Possession of the property was not in fact taken until after the alleged alteration was made. The right to take possession, and to sell the property and pay the mortgage debt, depended upon the covenants of the mortgage. If the alteration in question destroyed those covenants, it necessarily terminated the right of the mortgagee to the remedy which they provided. To say that the mortgagee acquired a vested right to that remedy when the mortgage was delivered, which could not be affected by its subsequent alteration, would be to say that such alteration, however fraudulent and material, would be without effect. It is clear that a rule of that kind would encourage fraud, and be in conflict with the authorities. It has been held that the fraudulent alteration of negotiable paper will prevent a recovery for the original consideration: *Woodworth v. Anderson*, 63 Iowa, 503. In the case of *Ransier v. Vanorsdol*, 50 Iowa, 130, the right of the vendee, who had taken possession of personal property under an altered bill of sale, to retain the proceeds, was sustained; but it does not appear that the alteration was fraudulent, and the conclusion of the court seems to have been founded upon the fact that the vendee did not ask any affirmative relief based upon the bill of sale. Other facts also distinguish that case from this. We conclude that if plaintiff's claim in regard to the alleged alteration be correct, defendants had no right to take possession of any of the property in controversy under the mortgage in question; for the insertion of the description of the wagon without the knowledge or consent of the mortgagor could not have been otherwise than fraudulent.

2. The evidence shows that the mortgage in controversy was drawn and taken by D. W. Halstead; that the description of the wagon was written in the mortgage by him; and that when the mortgage was executed and delivered, he acted as the agent of its owner. He claims that the description in question was in the mortgage when it was executed by plaintiff. The fifth paragraph of the charge is as follows: "If, however, you find from the evidence that the property mortgaged was originally purchased by plaintiff from D. W. Halstead, and

that all transactions in relation thereto, including the giving of the notes and securing the same, were had with D. W. Halstead, and that defendant B. M. Halstead intrusted the whole matter of renewing and securing the notes to D. W. Halstead, both as to time of extension and the kind and amount of security to be obtained, and that, after obtaining said mortgage, said D. W. Halstead fraudulently and wrongfully made the alleged alteration therein, then said D. W. Halstead was so far the agent of said B. M. Halstead that his said wrongful and fraudulent act will avoid the entire instrument; and if you find such to be the fact, the plaintiff will be entitled to your verdict for all the property." Appellants make numerous objections to the paragraphs quoted, the most important of which is, in effect, that it makes the owner of the mortgage responsible for the act of the agent in making the alteration, even though in so doing he acted without her knowledge or consent, and not within the scope of his agency. The case of *Bigelow v. Stilphen*, 35 Vt. 521, is especially relied upon by appellants as supporting their claim. We think the paragraph in question was substantially correct, as applied to the facts in this case. The agent was not restricted by the terms of his agency as to the security he might take. He was authorized to act upon his own judgment, and take such security as he thought best. In performing the duties assigned him, if the claim of plaintiff be true, he made a fraudulent alteration of the mortgage. In doing so, he did not act for himself, nor for the mortgagor, but for his principal. It may be conceded that such alteration was not contemplated by his instructions as agent, but it was not forbidden, and it operated as a legal fraud upon plaintiff. It was in the line of his agency, and because of it: *Mechem on Agency*, sec. 739; *Reynolds v. Witte*, 13 S. C. 5; 36 Am. Rep. 678. When the owner of the mortgage received it from the agent, she took it subject to all defects and defenses which the acts of her agent caused or authorized, and the fact that she did not know of them is immaterial: *Eadie v. Ashbaugh*, 44 Iowa, 519; *Farrar v. Peterson*, 52 Iowa, 420. In the case of *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232, the owner of a promissory note intrusted it to an agent for the purpose of having it discounted. The bank to which it was presented refused to discount it unless a material addition was made to it. The agent made the desired change without the knowledge of his principal, and the note was discounted. It was held that authority to alter the note could

not be inferred from the circumstances stated, and that the act of the agent in making it was as the act of a stranger, and did not invalidate the note. The alteration was not made with any fraudulent intent, and was clearly not within the scope of the agent's authority, as he was given no discretion in that respect. So far as the rule announced in *Bigelow v. Stilphen*, 35 Vt. 521, conflicts with the conclusions we have stated, it appears to us to be not only unsafe, but contrary to established legal principles.

3. Appellants complain that the defense presented by the general denial of the answer was ignored in various portions of the charge. They insist that the title of plaintiff to the property in controversy was put in issue by such denial, and that since he could recover only on the strength of his own title, the issue thus raised should have been submitted to the jury. It is shown by the pleadings and evidence, beyond question, that plaintiff is the owner of the property, unless defendants hold some adverse interest by virtue of the mortgage in controversy. The jury were instructed as to the issues raised by the pleadings concerning which there was dispute. Hence no prejudice could have resulted to defendants from the omission of the court to instruct in regard to the defense technically presented by the general denial.

4. Counsel for appellants discuss numerous other questions, which need not be referred to in detail. It is sufficient to say that we have examined the questions so presented with care, and conclude that the record discloses no error prejudicial to appellants. The charge to the jury, considered as a whole, was fair, and not of a nature to mislead or be misunderstood.

The judgment of the district court is affirmed.

AGENCY — LIABILITY OF PRINCIPAL FOR AGENT'S FRAUD. — The principal is liable for his agent's frauds, though committed without the principal's participation or consent, if they are perpetrated in course of employment, and not a willful departure from it: *Johnson v. Barber*, 5 Gilm. 425; 50 Am. Dec. 416; *Henderson v. San Antonio etc. R. R. Co.*, 17 Tex. 560; 67 Am. Dec. 675, and note; note to *Fitzsimmons v. Joslin*, 52 Am. Dec. 57, 58; *Griswold v. Gelbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878, and note.

ELDRED v. PETERSON.

[80 IOWA, 261.]

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — PART PAYMENT BY JOINT MAKER — ESTOPPEL. — Part payment by the joint maker of a note, and the erasure of his name therefrom, under an agreement that such payment and erasure should discharge his liability thereon, will not affect the validity of the note, nor release him from liability for the unpaid balance due thereon, whether such agreement was made with the payee, or by his authority, or not; nor is the latter thereby estopped, after failure to repudiate the erasure, and the subsequent insolvency of the other joint maker, to deny that the agreement and erasure were made by his authority.

W. I. Chamberlain and J. W. Jamison, for the appellant.

N. W. Hutchins, Sheean and McCarn, for the appellee.

BECK, J. 1. The note in suit was executed by defendant and another, jointly, for property purchased by them of plaintiff. The defendant, soon after the maturity of the note, paid nearly one half of the principal, under the following circumstances: He went to the house of plaintiff, and not finding him at home, made the payment to plaintiff's son, a minor, who at the time was in bad health. He requested the son to indorse the amount "Paid," and to take his name off the note, that is, to erase his signature, which was done. The son had no authority to make the erasure, and had never done business for his father. Upon the return of the father, the son gave him the money paid by defendant. He never informed defendant that he did not approve the son's act of erasing the signature to the note.

2. The defendant was a joint maker of the note, and as such was liable for the amount thereof. It is not claimed that he paid more than a part of the debt. We may assume that the plaintiff's son accepted the part in full payment, and that he had authority to do so. It is not pretended there was any consideration paid by defendant for the discharge of the whole debt upon payment of a part. A payment of a part of a debt in discharge of the whole debt, upon a promise of the creditor to receive a part in full satisfaction of the debt, without consideration, will not discharge the debt: *Works v. Hershey*, 35 Iowa, 340; *Rea v. Owens*, 37 Iowa, 262; *Sullivan v. Finn*, 4 G. Greene, 544; *Byran v. Brazil*, 52 Iowa, 350.

3. The erasure of defendant's name was done to evidence the discharge of the note upon a part payment. The erasure

was not intended as a discharge of the note. The part payment was intended to have that effect. The erasure failed in the purpose for which it was done. It therefore stands for naught. There was no discharge of the note, and it must be regarded as valid and binding. It cannot be claimed that the accidental erasure of the name of the maker of the note will discharge it. It would have no such effect, for the reason that there was no purpose to discharge the note. The note would be just as valid between the parties with the erasure as though it had not been made. So, as the erasure, because there was no consideration for the discharge of the note, has no effect, the note continues valid between the parties.

4. For another reason the erasure of defendant's name is of no effect. It was made without authority of plaintiff, and is therefore a void act.

5. It is said that plaintiff, by his failure to inform the defendant that he repudiated the erasure, and the subsequent insolvency of defendant's co-maker of the note, is estopped now to deny that it was done by his authority. There is more than one answer to this position. We have seen that as the attempted discharge of the debt and note for a payment of a part due without consideration would not have bound plaintiff had he made the erasure himself, he could treat the erasure and agreement to discharge the debt as void acts without advising defendant thereof. So, as the erasure was made without his assent, he surely can treat it as utterly void. He was, therefore, not required to advise defendant of his repudiation of the void act in erasing the signature to the note.

6. Defendant insists that by relying upon the erasure of the note he failed to secure himself against the default of his co-maker, whose subsequent insolvency puts it out of defendant's power to enforce payment from the co-maker. The erasure was a matter which originated with defendant, and was done at his request. He is presumed to have known the law, and therefore had no warrant in relying upon the discharge of the note by part payment, in the absence of any consideration supporting the transaction.

It is our opinion that the district court rightly directed a verdict for the plaintiff. The judgment, therefore, is affirmed.

NEGOTIABLE INSTRUMENTS. — An agreement by a creditor to accept from his debtor a less sum of money than is due upon a note is a mere *nudum pactum*, and no bar to recovery, if the note is not delivered up: *Pearson v.*

Thomason, 15 Ala. 700; 50 Am. Dec. 159, and note; but it is otherwise if the note is delivered up: *Draper v. Hitt*, 43 Vt. 439; 5 Am. Rep. 292. A promise by a creditor to accept from his debtor less than the amount due him, by way of compromise, is not a valid agreement: *Young v. Jones*, 64 Me. 563; 18 Am. Rep. 279.

BILLS v. BILLS.

[80 IOWA, 269.]

WILLS — CONSTRUCTION — FREE-SIMPLE OR LIFE ESTATE. — Where an estate or interest in lands is devised, or personalty is bequeathed, in clear and absolute language, without words of limitation, the devise or bequest cannot be defeated or limited by a subsequent doubtful provision in the will, inferentially raising a limitation upon the prior devise or bequest.

WILLS — CONSTRUCTION — FREE-SIMPLE OR LIFE ESTATE. — Where there is an absolute or unlimited devise of real property, or bequest of personalty, a subsequent clause in the will expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit it to a life estate. The will thus drawn must be interpreted to invest in the devisee or legatee the fee-simple title to the land, and the absolute property in the personalty.

J. S. Stacy, for the appellants.

Sheean and McCarn, and *W. G. Thompson*, for the appellees.

BECK, J. 1. The will presented for interpretation is in the following language: "In the name of God, amen, I, Sidney Elijah Bills, of the town of Strawberry Hill, in the county of Jones, and state of Iowa, of the age of sixty-one years, and being of sound mind and memory, do make public and declare this my last will and testament, in manner following; that is to say: 1. I give and bequeath to my wife, Irene Bills, all of my real and personal property situated in Jones County, Iowa, except as hereinafter specified; 2. I give and bequeath to my nephew Sanford H. Brownell all that real estate conveyed to me by him, containing one hundred and thirty-four (134) acres, more or less, situated in Decatur County, Iowa, and also all that real estate owned by me situated in the town of Sabula, Jackson County, Iowa; and 3. I give and bequeath to said Sanford H. Brownell the bay mare known by name 'Nellie,' now in Jones County, Iowa, also one hundred dollars in money, same to be taken in payment for what I owe him at this time; 4. I give and bequeath to my brother, Daniel B. Bills, the sum of one hundred dollars in money; 5. All the real and personal

property herein bequeathed to my wife, Irene Bills, remaining at her decease, I desire to be divided into five equal shares, to Daniel B. Bills and Abigail E. Diviney, and remaining shares to my brother's two sons, Frank E. Bills and Frederick A. Bills, and Sanford H. Brownell. All of which said several legacies or sums of money I direct and order to be paid to said respective legatees within one year after my decease; and I hereby appoint as my executors of this my last will and testament my wife, Irene Bills, and John Bender, of Jones County, Iowa, hereby releasing them from giving bonds, and hereby revoking all former wills by me made."

2. Plaintiff claims in her petition and insists that under the will she takes an absolute estate in fee-simple in the lands, and the absolute property in the personalty of the estate, and that the fifth item of the will simply uses precatory language, and does not limit the estate and interest vested in plaintiff by the first item. Defendants maintain the contrary, insisting that plaintiff takes but a life estate in the property, with the right to possess, enjoy, and use it, but after such estate and right shall be terminated by her death, the property shall be distributed under item 5 of the will.

3. In our opinion, the books teach these rules for the interpretation of wills: 1. When an estate or interest in lands is devised, or personalty is bequeathed, in clear and absolute language, without words of limitation, the devise or bequest cannot be defeated or limited by a subsequent doubtful provision inferentially raising a limitation upon the prior devise or bequest; 2. When there is an absolute or unlimited devise or bequest of property, a subsequent clause expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit the estate or interest in the property to the right to possess and use during the life of the devisee or legatee. The absolute devise or bequest stands, and the other clause is to be regarded as presenting precatory language. The will must be interpreted to invest in the devisee or legatee the fee-simple title of the land, and the absolute property in the subject of the bequest: *Williams v. Allison*, 33 Iowa, 278; *Benkert v. Jacoby*, 36 Iowa, 273; *Rona v. Meier*, 47 Iowa, 607; *Alden v. Johnson*, 63 Iowa, 127; *In re Will of Burbank*, 69 Iowa, 378; *McKenzie's Appeal*, 41 Conn. 607; 19 Am. Rep. 525; *Jackson v. Bull*, 10 Johns. 20; *Mitchell v. Morse*, 77 Me. 423; 52 Am. Rep. 781; *Ramsdell v. Ramsdell*, 21 Me. 288; *Jones v. Bacon*, 68

Me. 34; 28 Am. Rep. 1; *Harris v. Knapp*, 21 Pick. 412; *Lynde v. Estabrook*, 7 Allen, 68; *Fiske v. Cobb*, 6 Gray, 144; *Gifford v. Choate*, 100 Mass. 343; *Williams v. Worthington*, 49 Md. 572; 33 Am. Rep. 286; *Foose v. Whitmore*, 82 N. Y. 405; 37 Am. Rep. 572; *Campbell v. Beaumont*, 91 N. Y. 465; *Stowell v. Hastings*, 59 Vt. 494; *Seibert v. Wise*, 70 Pa. St. 147; *Moore v. Sanders*, 15 S. C. 440; 40 Am. Rep. 703; *Canedy v. Jones*, 19 S. C. 297; 45 Am. Rep. 777; *Anderson v. Cary*, 36 Ohio St. 506; 38 Am. Rep. 602. Cases cited by defendants' counsel are not in conflict with the doctrines we have stated, in that the instruments interpreted therein, by their express language, did not vest the devisee with the fee of the land, nor the legatee with the absolute property in the subject of the bequest, a contrary purpose clearly appearing in the wills.

These views lead us to the conclusion that the district court rightly overruled the demurrer to plaintiff's petition. Its judgment is affirmed.

WILLS, CONSTRUCTION OF — WHAT WORDS PASS A FEE. — An absolute devise to one passes the fee, notwithstanding a request made in a subsequent clause of the will with reference to the disposition of the estate at the devisee's death: *Barnes v. Simms*, 5 Ired. Eq. 392; 49 Am. Dec. 435; *Foose v. Whitmore*, 82 N. Y. 405; 37 Am. Rep. 572; *Williams v. Worthington*, 49 Md. 572; 33 Am. Rep. 286. For instances of wills whose provisions were held to pass an estate in fee-simple, see *Hughes v. Niklas*, 70 Md. 484; 14 Am. St. Rep. 377; *Wilkerson v. Clark*, 80 Ga. 367; 12 Am. St. Rep. 258, and note; *Carpenter v. Van Olander*, 127 Ill. 42; 11 Am. St. Rep. 92, and extended note 100-107. For instances of wills whose words were held to pass a life estate, see *Miller v. Potterfield*, 86 Va. 876; 19 Am. St. Rep. 919; *Long v. Paul*, 127 Pa. St. 456; 14 Am. St. Rep. 862, and note; note to *Carpenter v. Van Olander*, 11 Am. St. Rep. 99, 100.

BROWN v. GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN.

[80 IOWA, 287.]

MUTUAL BENEFIT SOCIETIES — CHANGE OF BENEFICIARY. — Where the laws of a mutual benefit society provide that a member may, after naming a beneficiary, surrender his certificate and procure a new one naming another person as beneficiary, such member does not, by naming a beneficiary and transferring the possession of the certificate to him, thereby convey to him any vested right or interest in the benefit during the member's life; but the latter may, although he regains possession of the certificate by false and fraudulent representations, surrender it to the society, and procure a new one naming another beneficiary, to the absolute exclusion of the beneficiary first named.

ACTION to recover on a benefit certificate issued by defendant, which acknowledged its liability for the amount named therein, and paid the same into court. The controversy was therefore between the plaintiff and the intervener, Mrs. Grace. The plaintiff was the daughter of James Grace, the assured, by his first wife, and the intervener was his second wife. In 1878 or 1879 he delivered the first certificate to plaintiff, who retained possession of it until February, 1887, when Grace obtained it from her by representing that he desired to make her sister a joint beneficiary with herself. Prior to such time, Grace had married the intervener without the knowledge of plaintiff, and after obtaining the certificate from her, he surrendered it to the society, and obtained a second certificate, naming the intervener as beneficiary therein. Grace died in July, 1888, and this action was to determine who was entitled to his death benefit. Judgment for the intervener, and defendant appeals.

A. J. P. Garesché, and Bronson and Carr, for the appellant.

Blair, Dunham, and Norris, for the intervener appellee.

GRANGER, J. It should be conceded at the outset that James Grace obtained the certificate from plaintiff by misrepresentation or fraud. We regard this fact as found by the district court, and we must consider the case with it in full view. With this point settled at the outset, we dispose of much said in argument in relation thereto, and bring ourselves to what we regard as the controlling question in the case.

Appellant concedes that if James Grace had procured the certificate with plaintiff's name therein as the beneficiary, and had retained possession thereof, he would have had the right to surrender it, and take a new certificate with another person as beneficiary, because he could then surrender the certificate, as he was required to do by the laws of the order. But it is urged that in this case he had parted with the possession of the certificate, and made a gift thereof to the plaintiff, by which she obtained a vested right or interest therein; and this is urged as the distinguishing feature of the case. Inasmuch as the certificate was in the possession of James Grace, and by him surrendered when the new certificate issued, the force and effect of such possession is sought to be avoided by the fact that the possession was fraudulent, and that James Grace could legally take no advantages from such possession. We think it must be conceded that the possession of the certificate

by James Grace gave him no rights, as against plaintiff, that he was not entitled to before she surrendered the certificate. If she had such a vested interest therein that she could legally have refused her father the possession thereof for the purpose of changing the beneficiary, as he did, we should strongly incline to the view — with the situation of this case as to the parties actually in interest — that he could not defeat such right by such indirect or fraudulent methods. If, on the other hand, she had no such interest in the certificate as would justify her in retaining it from him if he desired it for such purpose, then she suffered no prejudice from the fraud, and is in no position to complain; or at least she is not in a position, because of fraud, to claim as absolutely hers what before was only conditionally so. What, then, were the rights of the plaintiff because of the fact of her possession of the certificate? The authorities will be better understood if we keep in view the effect of naming a person in a certificate as beneficiary without surrendering to him the possession, which is, that it gives to such person no rights before the death of the assured, and that the certificate is revocable at the pleasure of the assured, under the provisions of the laws of the society. The authorities on the point are uniform, and are not questioned in this case. How, then, does the mere delivery of the certificate to the beneficiary change the right? It being only the evidence of what in law is a mere expectancy, the delivery of it conveys no present right; for no present right exists. The assured has no vested property rights that he can convey: *Bacon on Benefit Societies*, sec. 289. The section says: "The member of a beneficiary organization, on the other hand, as we have seen, has no property interest in the benefit, but only the naked power of designating some one to receive it. This designated recipient, also, has no property nor vested rights in the benefit, because his interest is contingent and uncertain, the power of the member to revoke the appointment and substitute a new beneficiary being specially reserved by the laws of the society, which laws enter into and form a part of the contract."

The possession of the certificate by the beneficiary makes her no more than a beneficiary. A beneficiary has no vested rights until the death of the member occurs: *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189; *Richmond v. Johnson*, 28 Minn. 447. In this respect a certificate in a beneficiary association differs from an ordinary life policy, and this difference,

as expressed in *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189, is as follows: "In the one case the rights of the beneficiary are fixed and vested from the moment the policy takes effect. In the other, they are subject to such changes as the law of the association authorizes the member to make. All that a beneficiary has during the lifetime of a member, owing to his right of revocation, is a mere expectancy dependent upon the will and pleasure of the holder of the certificate. This expectancy is not property: *Durian v. Central Verein*, 7 Daly, 168."

The case of *Byrne v. Casey*, 70 Tex. 247, is a Texas case, and involves the effect of a gift, and that particular point was urged, as in this case. Byrne took a certificate in a benefit association, with his wife therein as beneficiary, and delivered to her the certificate, which she kept for about one year, and paid several assessments thereon, and delivered it to the defendant, Casey, for safe-keeping. Byrne, without the knowledge or consent of his wife, withdrew the certificate from Casey, surrendered the same, and took a new one, with Casey and Swasey as beneficiaries. Mrs. Byrne had no knowledge of any change in the certificate until after the death of Byrne. A significant feature of that case is, that when the certificate issued, the laws of the society gave a member the right to change the beneficiary in his certificate, with "the consent of his beneficiary indorsed thereon." After the delivery of the certificate to Mrs. Byrne, and without knowledge to her, the society so changed its laws as to strike out the clause with reference to the consent of the beneficiary; and thereafter, and under the law as changed, Byrne effected a change of beneficiaries. The facts of that case are stronger in favor of Mrs. Byrne than are those of this case in favor of the plaintiff. In that case, as in this, the society placed the money in court, and the question was presented as to the rights of the respective beneficiaries. The court held in favor of those named in the latter certificate, and placed its holding on the rule that "the beneficiaries named have no perfect or vested rights in the certificate; that the rules as to change of the beneficiaries were for the protection of the order; and that the member, under the by-laws, could determine the course of the benefit fund against those named as beneficiaries in the certificate." The court cites, in support of this holding, *Splawn v. Chew*, 60 Tex. 534; *Manning v. Ancient Order etc.*, 86 Ky. 136; and *St. Patrick's Male Ben. Soc. v. McVey*, 92 Pa. St. 510.

Keeping in view the fact that the plaintiff in this case, even with the possession of the certificate, was no more than a beneficiary, we may profitably quote from our statute. A part of section 7, chapter 65, Acts Twenty-first General Assembly, is in these words: "Any member of any corporation, association, or society operating under this act shall have the right at any time, with the consent of such corporation, association, or society, to make a change in his beneficiary, without requiring the consent of such beneficiary." The act is one for the regulation of mutual benefit associations; and while it recognizes an authority or control as to such changes on the part of the association, it clearly authorizes such changes without the consent of the beneficiary. Appellant does not, in argument, question the validity of this statute; and we must not, in any sense, be understood as holding that such a statute could operate to impair vested rights. We have cited it in connection with authorities holding that such beneficiaries have no vested rights.

The case of *Fisk v. Equitable Aid Union*, from the supreme court of Pennsylvania (Oct. 10, 1887, 11 Atl. Rep. 84), is one, also, in which there was a delivery of the certificate by the wife, who was a member of the union, and her husband the beneficiary. Besides the possession of the certificate, he paid all the assessments on it, and the wife changed the beneficiaries. The court says: "Notwithstanding the fact that the certificate was delivered to the plaintiff, and the assessments thereon were paid by him, his wife had the right, on presenting it to the supreme secretary, to apply for and effect a change in the designation of the beneficiary named therein. . . . When plaintiff accepted the original certificate, and paid the assessments thereon, he knew, or ought to have known, that he held it subject to the right of his wife to change the designation of those to whom the insurance money should be paid upon her death." These cases seem quite conclusive of the question before us. Whatever consequences should attach to the fraudulent acquirement of the certificate, it could not have the effect of creating a vested right where none existed before. If plaintiff, with the possession of the certificate, had no such right therein as would defeat the right of her father to change the beneficiary, she had no such right as would justify her retention of it if he demanded it for that purpose.

Appellant cites some authorities claimed to announce a dif-

ferent rule; but we think, with similar facts, there is no serious conflict. Some of the authorities cited by appellant we have cited in support of our holding. Others are unlike this case as to facts, some of them being cases where the insurance was in "old-line companies," wherein a different rule is conceded, because of vested rights from the issuing of the policy.

With these views, the judgment of the district court must be affirmed.

MUTUAL BENEFIT SOCIETIES — CHANGE OF BENEFICIARIES. — For the law respecting the designation, change, and rights of beneficiaries in mutual benefit societies, see note to *Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 786-790.

STATE v. FOX.

[80 IOWA, 312.]

CRIMINAL LAW — BURGLARY. — **INDICTMENT** for burglary, alleging that the house entered "belonged" to a certain party, naming him, sufficiently charges the ownership of the house.

CRIMINAL LAW — BURGLARY. — **INDICTMENT** for burglary is not bad for duplicity when it alleges that the entering was done for two purposes; namely, with an intent to steal, and with an intent to commit adultery.

CRIMINAL LAW — BURGLARY — PRESUMPTION. — One who breaks into the dwelling-house of another in the night-time, in the absence of any explanation of the act, will be presumed to have intended to commit a public offense, but such presumption may be overcome by evidence.

CRIMINAL LAW — BURGLARY — VERDICT SUPPORTED BY PRESUMPTION. — One who breaks into the dwelling-house of another in the night-time, in the absence of any explanation of the act, will be presumed to have intended to commit a felony, and if he was identified while in the house, a verdict of guilty of burglary will be sustained.

H. S. Vaughn, for the appellant.

J. Y. Stone, attorney-general, for the state.

BECK, J. 1. The indictment charges that defendant did feloniously and burglariously break and enter a dwelling-house, "with intent there and then to take, steal, and carry away the property of George W. Flock, and then and there to commit a public offense, to wit, larceny, and with intent then and there to commit adultery with one Hattie Price, contrary to statute," etc.

2. Counsel first insist that the indictment, in alleging that the house entered in the commission of the offense is a dwelling-house belonging to George W. Flock, does not show the ownership thereof. He maintains that the word "belonging"

does not express the idea of property. The position is incorrect. The primary meaning of the word "to belong" is "to be the property of." The word is aptly used to express ownership.

3. It is claimed that the indictment is bad for that it charges that the entering was done with two purposes, — an intent to steal, and an intent to commit adultery. The intent does not constitute the crime, but it is an essential ingredient thereof. The crime consists in entering with an intent to commit a crime. It is plain that if an intent exist to commit two or more offenses, the act is none the less a crime, and it may be established by proof of one or all the intents alleged: 3 Greenl. Ev., sec. 16. The rulings of the court complained of on this ground are correct.

4. An instruction, the tenth, is in the following language: "If you find that in the night-time the defendant broke and entered the dwelling-house described in the indictment, this fact would be strong presumptive evidence that the defendant did such breaking and made such entry with the intent to commit a public offense. But such presumption may be overcome by evidence." This instruction is a ground of complaint by defendant. It is in accord with legal principles, reason, and decisions of this court. Men's purposes are only revealed by their acts. One who breaks into the dwelling-house of another in the night-time, in the absence of any explanation of the act, will be presumed to have intended to commit a public offense. His silence as to his intent is evidence that it was to commit a crime. The character of the house entered, — a dwelling; the time of entering, — at night; and the absence of explanation of the act, — raise a presumption of an intent to commit a public offense: Wharton's Crim. Law, sec. 1600; *State v. Maxwell*, 42 Iowa, 208; *State v. Teeter*, 69 Iowa, 717.

5. It is urged that the evidence fails to support the verdict. We think differently. The breaking and entering was proved beyond a doubt; and defendant was clearly identified while in the house. His intent to commit a felony is established by presumptions of law arising upon the facts of the case.

The judgment of the district court is affirmed.

BURGLARY — INDICTMENT — AVERMENT OF OWNERSHIP OF HOUSE BURGLARIZED. — In charging burglary, an indictment which avers that defendant "did feloniously and burglariously break and enter into a certain building of one Neal Barman, . . . the same being used and occupied by the said

Neal Barman as a saloon," is a sufficient allegation of the ownership of the building, and no averment need be made as to the ownership of the property which defendant is accused of having intended to steal: *State v. Tyrrell*, 93 Mo. 354. An indictment is fatal when not alleging the ownership of the house alleged to have been burglarized: *State v. Hupp*, 31 W. Va. 355; compare *Aldridge v. State*, 88 Ala. 113; 16 Am. St. Rep. 23, and note; note to *People v. Richards*, 2 Am. St. Rep. 394.

BURGLARY — NIGHT-TIME. — To constitute burglary, the act charged must have been committed during the night-time: Note to *People v. Richards*, 2 Am. St. Rep. 388, and also page 396 of the same note, upon the question of how it may be shown that the offense was perpetrated at night-time. In Arkansas, the act must be committed in the night-time: *Harvick v. State*, 49 Ark. 514. But, under the Kansas statute, a person who enters a house by breaking into it in daytime, in which there is at the time no human being, may be convicted of burglary in the third degree, his intention having been to commit a felony: *State v. Cash*, 38 Kan. 50.

ROLLINS v. SHAVER WAGON AND CARRIAGE Co.

[80 IOWA, 380.]

ATTACHMENT OF CORPORATE PROPERTY BY OFFICER OF CORPORATION, to secure the payment of a debt honestly due by it to him, creates a lien superior to that of a trust deed subsequently executed by it, or of subsequently attaching creditors, although he knew at the time of levying his attachment that the corporation was financially embarrassed and that his attachment would precipitate a crisis in its affairs, for the prior condition of which he was in no way responsible.

TRUST DEED BY INSOLVENT CORPORATION which is in effect a general assignment to secure certain of its creditors is not void on the ground that it gives preferences, nor is it void as being the result of a fraudulent combination because the decision of its directors as to what creditors should be secured was the result of a compromise, nor is it void because some of the claims secured by it were fraudulent, while others were unquestionably just.

WHERE TRUST DEED BY INSOLVENT CORPORATION to secure certain creditors is shown to have been executed under a resolution passed at a meeting of directors, at which four out of five of them were present, two voting in favor of and one against its adoption, and the minutes of the meeting show that it was adopted, and that they were signed and approved by the president, thus raising the presumption that he voted for the resolution, if that was necessary to its validity, although his vote is not shown by the minutes, the deed is legal and valid, if adopted by the creditors named therein as beneficiaries.

TRUST DEED BY INSOLVENT CORPORATION TO SECURE CREDITORS — COMPLAINT OF FRAUD BY SUBSEQUENT CREDITORS. — Where a trust deed is given by an insolvent corporation to secure certain creditors, and one of the secured creditors holds notes against the corporation, given for value, the other creditors cannot claim a set-off on account of fraud in another transaction between such creditor and the corporation, if such transaction took place before they became creditors.

CORPORATIONS — RIGHT TO SURRENDER STOCK. — A corporation may contract to surrender its stock, when its articles of incorporation do not prohibit such contract, while the powers they enumerate are broad enough to include the right to make it.

TRUST DEED EXECUTED BY DIRECTORS OF AN INSOLVENT CORPORATION to secure certain creditors is not void as to one of the creditors secured, on the ground that certain of the directors executing it were relatives of such creditor, when it appears that they acted in good faith and without fraudulent intent.

Wishard and Baily, Mitchell and Dudley, and Bousquet and Earle, for the appellants.

Phillips and Harrison, E. J. Goode, and Cummins and Wright, for the appellees.

ROBINSON, J. The Shaver Wagon and Carriage Company is a corporation duly organized, which commenced its corporate existence on the ninth day of February, 1886. The articles of incorporation provide that it shall have the following powers, viz.: "To make contracts; to acquire by deed, lease, assignment, or otherwise, any property, both real and personal, and to transfer the same at its pleasure; to mortgage or encumber any of its property; to sue and be sued by its corporate name, and in like manner do all other acts and exercise all other powers necessary to be done or performed in and about the conducting or carrying on the business for which such incorporation was organized, as fully, in every respect, as private individuals might or could do under the laws of the state." The business of the company was managed by a board of five directors, a majority of whom constituted a quorum. On the twelfth day of February, 1886, a certificate for one hundred shares of stock, of one hundred dollars each, was issued to J. T. James. The stock so issued was paid for by the transfer to the wagon and carriage company of bonds of the American Coal Company to the amount of ten thousand dollars. On the fifteenth day of the same month the certificate of stock issued to J. T. James was canceled, and in lieu thereof, one for the same number of shares was issued to his wife, O. M. James. On the twenty-fourth day of January, 1887, the board of directors of the wagon and carriage company accepted a proposition of Mrs. James to transfer to her the bonds of the coal company in exchange for the stock issued to her as aforesaid, and the exchange was effected accordingly. In August, 1888, defendant Bibbins became a stockholder of the wagon and carriage company, loaned it three thousand dol-

lars in money, and entered its service as an employee. In the next month he became a member of its board of directors. In October, 1888, the company was financially embarrassed; and to recover the money he had loaned it, and which was then due, Bibbins, on the sixteenth day of that month, commenced an action against the company, aided by attachment. During the following night the trust deed in suit was executed to secure debts owing to the Valley National Bank of Des Moines, O. M. James, Kelley, Maus, & Co., Tuthill Spring Company, J. W. Mills, W. T. Shaver, and George Pattee. It conveyed nearly all the property of the wagon and carriage company. On the next day several creditors commenced actions against the company, which were aided by attachments. The writs were levied upon certain real estate of the company, situate in Des Moines. On the twenty-third day of October, 1888, the plaintiff, as trustee, commenced this action to foreclose the deed of trust, and made parties defendant the wagon and carriage company and the attaching creditors. O. M. James assigned the notes made to her, and secured by the trust deed, to the Western Mining and Investment Company, and gave notice thereof on the seventh day of November, 1888. On the 11th of January, 1889, J. W. Mills filed notice of the assignment of the notes made to him, and secured by the trust deed, to the Des Moines Savings Bank. The assignees of Mrs. James and of Mills, and the other creditors who were secured by the trust deed, excepting the Valley National Bank, appeared in the action, and filed petitions of intervention. Haydock Brothers also intervened, claiming an interest in the real estate conveyed by the trust deed by virtue of a judgment, a transcript of which was filed in the office of the clerk of the district court of Polk County on the twenty-ninth day of October, 1888. John H. Queal & Co. were creditors of the wagon and carriage company, and had commenced their action, aided by attachment, and caused their writ to be served on the sixteenth day of October, 1888. The trust deed specially provides that the claims of the Valley National Bank shall be preferred and paid in full before payment shall be made on the other claims secured by the trust deed. The petition demands the foreclosure of the trust deed, and asks the appointment of the plaintiff as receiver, with power to continue the business of the wagon and carriage company so far as it may be necessary and practicable to complete and dispose of the goods in the process of manufacture. From the

subsequent pleadings and the decree, we infer that the appointment was made as asked.

The district court, after a trial on the merits, found and decreed as follows: 1. That the attachment of defendant Bolton for rent was paramount to the claim of the other parties to the action, and it was established as a first lien upon the property in controversy; 2. That the lien of John H. Queal & Co. was senior to the rights of the creditors secured by the trust deed; 3. That the Valley National Bank was a preferred creditor under the trust deed, and entitled to have its claim paid from the trust property before payment therefrom to other creditors secured by the deed; 4. That Kelley, Maus, & Co., Tuthill Spring Company, Des Moines Savings Bank as assignee of Mills, and George Pattee, were entitled to have their claims paid by the receiver after the claims of Bolton, Queal & Co., and the Valley National Bank were satisfied. The amount to which each one was entitled under the trust deed was ascertained and fixed; 5. That J. D. Seeberger, Chicago Varnish Company, C. L. Pritchard, Davis, Reyburn, & Co., Coombs & Co., Thomas McFarland, T. T. Haydock Carriage Company, and Haydock Brothers were entitled to the payment of their claims, as attaching and judgment creditors, after the payment of the creditors previously specified, and that in case any sum remained in the hands of the receiver after paying all of such creditors, the sum found to be due Bibbins in a suit at law then pending should be paid him; 6. That the attachment of Bibbins was invalid as against the creditors of the company, and created no lien upon its property; 7. That the trust deed was invalid as to O. M. James and her assignee, the Western Mining and Investment Company, and as to W. T. Shaver, and they were denied relief thereunder.

The defendants Bibbins, Pritchard, Coombs & Co., Davis, Reyburn, & Co., and T. T. Haydock Carriage Company, and the intervener the Western Mining and Investment Company, appeal.

1. Interveners the Des Moines Savings Bank, Pattee, Shaver, Kelley, Maus, & Co., Tuthill Spring Company, and Western Mining and Investment Company separately attack the attachment of Bibbins in their petition, in language substantially as follows: "The intervener is informed and believes, and further alleges, that the writ of attachment issued from the district court of Polk County in the suit in which M. W.

Bibbins is plaintiff and the Shaver Wagon and Carriage Company is defendant, and levied upon a portion of the property described in and conveyed by said trust deed, was wrongfully and maliciously sued out, and that the damages resulting therefrom should be distributed among the creditors holding valid claims under said mortgage or deed of trust; and this intervener denies that any attaching creditor, party hereto, has any lien upon the said property paramount or prior to the lien of said mortgage or deed of trust." The grounds upon which the writ in favor of Bibbins was issued are not shown, and whether they were true does not appear. The action of the court in denying the validity of the attachment was undoubtedly based upon the theory that, under the facts of this case, Bibbins could not assert his claim, to the prejudice of the other creditors of the company. The decree provides that it is to be without prejudice to the right of Bibbins to recover a judgment against the company for whatever sum may be due him in the suit then pending at law, and that it is to be without prejudice to the right of the company to recover for the alleged wrongful and malicious suing out of the writ. The question of the rightful suing out of the writ was not adjudicated, excepting as it affected creditors. We are therefore led to inquire whether there was anything in the relations of Bibbins to the company to make his attachment invalid. That his claim was for money loaned to the company in good faith, and that it had been due several weeks when his action was commenced, is not disputed. He knew that the company was embarrassed financially; that there were claims against it due and unpaid; that debts in large amounts were about to become due, and that the company had no money with which to pay them; that several of the directors were insisting that claims held by certain of their friends should be paid; that one of the directors had taken a portion of the assets of the company, without authority by the board, and had delivered it to a creditor of the company. There was a want of harmony among the officers of the company, and the outlook was unfavorable. It is true, Bibbins was an officer of the company; but he had been such officer but a few weeks, and was not responsible for the condition of the company. He was induced to become a stockholder, and to loan the money in controversy, under a misapprehension of the condition of the company. It is also true that he had reason to believe that his action in com-

mencing suit would precipitate a crisis in the affairs of the company, and that there were negotiations pending which might result in the sale of stock to the amount of ten thousand dollars, which might be consummated if no action was taken by creditors to prevent. But the result of the negotiations was uncertain, and we do not think that Bibbins was under obligations to await their termination, under the circumstances of the case. It was held in *Warfield v. Marshall County Canning Co.*, 72 Iowa, 667, 2 Am. St. Rep. 263, that a corporation may prefer its own stockholders and directors to other creditors, and that a mortgage given to secure an officer and stockholder was valid, even though it was authorized by his own vote. In *Garrett v. Burlington Plow Co.*, 70 Iowa, 702, 59 Am. Rep. 461, it was said that "no reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent, in a fair and honest way, take its property in security." Numerous authorities are cited in the cases referred to in support of the conclusions announced. The right of a creditor to take property by means of an action aided by attachment is recognized by law to be both fair and honest, when a statutory ground for suing out the writ exists. Bibbins acted in good faith, and in a reasonable effort to protect his own interests. Had he taken a mortgage to secure his claim, its validity could not have been questioned, although the result to the business of the company would probably have been the same as that which followed the attachment. The record discloses nothing which shows that the levy of the writ was invalid; and since it was made before the trust deed was executed, we think it created a lien paramount to the interests which that conveyed, and paramount to those acquired by subsequent attachments and judgments. The conclusion we reach makes it unnecessary to determine whether the creditors could, in any event, successfully attack an attachment by the means adopted in this case.

2. The trust deed is assailed on several grounds. It is said that it was, in effect, a general assignment with preferences, and, therefore, that it is void. It is well settled that an insolvent debtor may lawfully mortgage all his property for the security of a portion of his debts, even though nothing is left for the payment of those unsecured: *Southern White Lead Co. v. Haas*, 73 Iowa, 404, and cases therein cited.

It is said that it was executed pursuant to a fraudulent

agreement and combination. The evidence does not support this claim. Different members of the board of directors favored securing different creditors, and the trust deed as executed was to some extent a compromise. But it was not designed to accomplish any illegal purpose, although it was intended to prefer the creditors therein named to others. The directors who authorized it were not working together harmoniously, and the only combination made was, that concessions were made in order to secure the execution of the trust deed.

It is said it was an attempt to encumber the property of the company with unjust claims. Some of the claims secured by the trust deed are unquestioned. If others were fraudulent, that fact would not necessarily invalidate the trust deed: *Prince v. Shepard*, 9 Pick. 177; *Smith v. Post*, 3 Thomp. & C. 650; Bump on Fraudulent Conveyances, 488.

It is said the deed was executed without authority. It was executed by virtue of a resolution of the board of directors of defendant. The minutes of the meeting at which the resolution was adopted show that four of the five members of the board were in attendance, with "J. T. James in the chair." The resolution was introduced by H. D. Reeves, and seconded by W. T. Shaver. The record of its adoption is as follows: "Yeas, Reeves and Shaver; nays, Andersen. Motion was carried." The minutes were signed and approved by J. T. James as president. It is said that in order to bind the corporation it was necessary that a majority of the directors present should vote for the adoption of the resolution. The minutes do not show that the president of the board was present when the vote was taken; but conceding that he was, and that three affirmative votes were necessary to adopt the resolution, we think the record justifies the conclusion that they were in fact given, although not formally recorded. If the president was present, he no doubt announced the result of the vote; and if his vote was necessary to authorize the announcement he made, it will be presumed to have been given. The record does not show that it was not so given, while the approval of the minutes by the president is strong corroboration of the statement of the minutes that the motion was carried. It is not a case where the law requires the votes to be separately recorded before action thereon can be taken. The evidence shows that the trust deed was duly accepted by the various creditors who were named as beneficiaries, and we think it should be held to be a legal and valid instrument.

3. When the trust deed was executed, the wagon and carriage company owed to Mrs. James eight thousand five hundred dollars, besides interest on seven promissory notes, and the trust deed provided for their payment. We do not understand that the genuineness of these notes, and that they were unpaid, is seriously questioned by any one. There is nothing in the record to justify the conclusion that they were not given in good faith, and for a valid indebtedness, excepting as they are affected by an alleged set-off or counterclaim, which we will now proceed to consider. It is said that the surrender by Mrs. James of her stock in the wagon and carriage company, to the amount of ten thousand dollars, in exchange for the bonds of the American Coal Company, was fraudulent, and without authority on the part of the wagon and carriage company. The stock held by Mrs. James was originally issued to her husband for the bonds of the coal company in question. The bonds were used by the wagon and carriage company for some time as collateral security for the procurement of loans. In January, 1887, they were held by the Valley National Bank as collateral security; but for some reason it had become distrustful of the bonds, and not deeming them sufficient to secure a three-thousand-dollar loan, demanded other security. Mrs. James then made the proposition already referred to, which was accepted. In addition to surrendering her stock, Mrs. James advanced the company an amount of money to pay the debt, to secure which the bonds were held by the bank. In the light of subsequent developments, it is clear that Mrs. James profited most by the exchange; but at the time it was made, the bonds of the coal company were of uncertain value, and the approaching failure of the wagon and carriage company was unknown. On the whole, we do not think it is shown that the exchange was fraudulent. Moreover, the transaction took place before any material part of the indebtedness involved in this suit, aside from that held by Mrs. James, was contracted, and if the transaction was in fact fraudulent, creditors whose claims were created subsequently could not complain of it: *Fifield v. Gaston*, 12 Iowa, 221; *Whitescarver v. Bonney*, 9 Iowa, 484; *Porter v. Pittsburg etc. Steel Co.*, 120 U. S. 649; *Graham v. La Crosse etc. R'y Co.*, 102 U. S. 148.

It is said the company had no authority to contract for the surrender of its own stock. The articles of incorporation do not prohibit such contracts, while the powers they enumerate

are broad enough to include the right to make them: *Iowa Lumber Co. v. Foster*, 49 Iowa, 26; 31 Am. Rep. 140; *City Bank v. Bruce*, 17 N. Y. 510; *Commissioners v. Thayer*, 94 U. S. 631. It follows from what we have said that the wagon and carriage company could not have asserted any claim against Mrs. James, at the time the trust deed was executed, on account of her acquisition of the bonds of the American Coal Company. Therefore, whatever rights she acquired by virtue of the trust deed passed to her assignee, the Western Mining and Investment Company.

4. It is further objected that when the trust deed was authorized and executed, the husband of Mrs. James was the president and a director of the company, and her brother, Mr. Reeves, was also a director, and that the deed could not have been authorized but for their influence. The relationship of the directors named to Mrs. James would not prevent their acting to secure her claims. She was not an officer nor stockholder of the company at that time; but had she been one of its officers, that fact would not have deprived her of the right to enter into competition with other creditors in a race of diligence, availing herself of her superior knowledge and of her position to obtain security for or payment of her debt: *Buell v. Buckingham*, 16 Iowa, 291; 85 Am. Dec. 516; *Warfield v. Marshall Co. Canning Co.*, 72 Iowa, 666; 2 Am. St. Rep. 263; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461. Much less would it have prevented her relatives on the board from acting in good faith, and without fraudulent intent, to secure or pay her. Much is said by counsel in regard to the original organization of the company. It is probable that some of its stock was issued for an insufficient consideration; that some of the organizers of the company contributed property of little or no value, and received in exchange stock in large amounts at par; but nothing is disclosed of which any creditor can take advantage in this action to defeat the claim of Mrs. James, for reasons already stated.

5. The views we have expressed make it unnecessary to determine other questions discussed by counsel. We conclude that the attachment of Bibbins is valid, creating a lien upon the property on which it was levied paramount to the interest therein created by the trust deed. We also conclude that the trust deed operated to convey to Mrs. James an interest in the property therein described which her assignee, the Western

Mining and Investment Company, is entitled to enforce. The correctness of the decree as to defendant W. T. Shaver is not presented by the appeal, and is not determined.

Reversed.

CORPORATIONS, SUITS AGAINST, BY DIRECTORS, TO COMPEL THE PAYMENT OF DEBTS: See note to *Beach v. Miller*, 17 Am. St. Rep. 307, 308.

CORPORATIONS, POWERS OF. — A corporation may make an assignment of its entire property, preferring some of its creditors to others; and it is immaterial that the preferred creditors are directors or share-holders of the corporation: *Warfield v. Marshall Co. C. Co.*, 72 Iowa, 666; 2 Am. St. Rep. 263, and note. So a corporation may mortgage its property to secure an indebtedness due its directors, or some of them, and such mortgage is not invalid because the directors are preferred to other creditors, or because the debt it secures is in amount beyond the prescribed limit for corporation indebtedness: *Garrett v. Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461, and note 466-471. Compare note to *Beach v. Miller*, 17 Am. St. Rep. 298-308, upon the question of transactions between a corporation and its directors.

MATHEWS v. CITY OF CEDAR RAPIDS.

[80 Iowa, 459.]

CONTRIBUTORY NEGLIGENCE, WHEN QUESTION OF FACT. — Where, in an action to recover for personal injuries, it is shown that plaintiff was passing along a well-lighted street, and being attracted by a brilliantly lighted show-window, he turned and approached it, and in doing so fell into an opening on the sidewalk, above the surface of which there was nothing to obstruct his approach or indicate danger, although the opening was plainly visible, it cannot be said, as matter of law, that he was guilty of contributory negligence; but this question should be submitted to the jury as one of fact, to be determined from the evidence in the case. In such case, all that is required of the pedestrian to avoid accidents is, that he act as a reasonably prudent and careful man would under the circumstances, and an instruction that he must look where he is walking, and avoid all obstacles which are dangerous and plainly visible, is erroneous.

CONTRIBUTORY NEGLIGENCE, WHEN QUESTION OF LAW OR FACT. — If, from the undisputed evidence, only one conclusion can reasonably be drawn, contributory negligence is a question of law. If, however, under the facts, different minds might reasonably reach different conclusions, it is a question of fact for the jury.

NEGLECT — EVIDENCE OF FORMER ACCIDENTS. — In an action to recover for personal injury received from falling into an opening on the sidewalk of a well-lighted street in a city, evidence that prior thereto other parties had fallen into the same opening, and that the owner of the building in front of which the opening was situated was aware of the facts, is inadmissible.

ACTION against the city of Cedar Rapids and one Mansfield to recover for personal injury received from falling through an opening known as an "area-way," in the sidewalk, and designed to admit light and air to the basement. Such "area-way" was in front of a store building, owned at the time by defendant Mansfield. The other facts are stated in the opinion. Judgment for defendants, and plaintiff appeals.

Hormel and Harrison, for the appellant.

C. J. Deacon, I. N. Whittam, and Mills and Keeler, for the appellees.

GRANGER, J. 1. An exception is taken to instruction number 10, given by the court; and we first notice that, as it seems to be the principal "bone of contention" in the case. Before quoting the instruction, it is proper to say it is undisputed in the case that the opening through which plaintiff fell was in full view of one approaching the window, and if plaintiff, as he approached the window, had looked for defects at that place, he must have seen it. It may be said as a fact in the case, that after he turned to go to the window, he went until he fell, without any thought as to danger, looking only at the attractions in the window. In view of these facts, the court gave the following instruction: "10. Plaintiff had the right to pass along said street, and it was the duty of plaintiff, in passing along said walk, to act as an ordinarily prudent man would, and walk as an ordinarily prudent man would walk. *He must use his eyes, and look where he was walking, and avoid all obstacles which were dangerous in their character, and which were plainly visible, and not obscured.* He must act carefully and prudently, considering all the circumstances surrounding him. If he did so, and met with an accident which was caused by the negligence of the defendants, then he can recover for the damages sustained. If he did not use such care and prudence, and met with an accident, then he cannot recover, although the defendants may also be negligent."

The precise complaint is made to the Italicized portion of the instruction. After a careful consideration of the authorities cited, and the reasoning given in its support, we think it erroneous. The instruction has reference to the contributory negligence of the plaintiff; and if the Italicized portion is omitted, the instruction seems to express very fairly the rule as to such negligence: *Rusch v. City of Davenport*, 6 Iowa, 443; *Cotes v. City of Davenport*, 9 Iowa, 227; *Little v. McGuire*, 43

Iowa, 447. The rule is of almost universal recognition. It is now proper to inquire to what extent the *Italicized* portion would affect or change the rule. We think, reduced to fewer words, the instruction means this: A person walking on a public street must, to avoid accidents, act as a reasonably prudent and careful man would act, considering all the circumstances surrounding him. He must look where he is walking, and avoid all obstacles which are dangerous and plainly visible. The conclusion from the instruction is, that a reasonably prudent man will avoid all obstacles in his pathway that are plainly visible. The effect of the instruction, then, was to say to the jury that if the opening into which the plaintiff fell was plainly visible, he could not recover, and a further effect was to determine the case; for the plaintiff admitted in his testimony that by looking he could plainly see the opening, and as a consequence the question was made one of law, and not one of fact for the jury. It is true, the question of negligence is sometimes one of law, but it is not at all times, and the rule to determine the question is, if, from the undisputed facts, but one conclusion can reasonably be drawn, then the question is one of law; but if, under the facts, different minds might reasonably reach different conclusions, it is a question of fact for the jury: *Milne v. Walker*, 59 Iowa, 186; *Whitsett v. Chicago etc. R. R. Co.*, 67 Iowa, 150. See also *Bennett v. Syndicate Ins. Co.*, 39 Minn. 254; *Indianapolis etc. Railway Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578; *Barnes v. Sowden*, 119 Pa. St. 53.

Then to the test: The plaintiff was passing along a well-lighted street. A brilliantly lighted show-window, with an attractive display of articles, arrested his attention. He turned, and approached the window. There was nothing above the surface of the walk to obstruct his approach or indicate danger. Would all reasonable minds concur in the opinion that in approaching such a window a person must so far anticipate danger as to look where he walks, to know if there are openings into which he might step? In this case the plaintiff turned, and walked with his eyes constantly on the exhibits in the window, and did not see the opening until he fell. Would all say that in so doing he was negligent? In observing the articles, he was answering the manifest design of their being placed there. As placed, they were a standing invitation to passers-by to view them. With nothing above the surface of the walk to prevent, would all persons agree that it was unreasonable for one to

believe that the invitation was to come near and see, and that for such a purpose the way was safe? Is it the rule that persons passing along the walk in a city must keep such a lookout as to know if there are openings through which they might step, and that it is negligence, as a matter of law, not to discover one that is plainly visible by one observing where he is walking? It is admitted that it may be as a question of fact; but is it as a matter of law? Such observation is not the experience of persons in general. They assume, as we think they have a right to, that the walks are made without such defects, and observations generally are as to the obstructions, or what may be encountered above the surface, as boxes or displays of goods on the walk. If one should shut his eyes and walk along the street, and meet with an accident, all might say he was negligent because of such fact. But if he walked with eyes open, observing his general course, in the usual manner, with a like result, although he might be negligent as a matter of fact, the law would not determine him so. The rule of the instruction makes no allowance for the attention being attracted to other things, but is fixed and unalterable, and not in harmony with that announced in *Murphy v. Chicago etc. R. R. Co.*, 38 Iowa, 539, and *Messenger v. Pate*, 42 Iowa, 443.

Appellees cite with much confidence the case of *Yahn v. City of Ottumwa*, 60 Iowa, 429, to support the instruction given; but there is a clear distinction. In that case the plaintiff and his wife were just starting with their team on a street in the defendant city, when the wheel of the wagon struck a stone, and the wife was injured by falling from the wagon. The court refused an instruction to the effect that "it was the duty of the plaintiff's husband to use care in driving, and look where he was driving, and to avoid all obstacles which were dangerous in their character, and which were plainly visible, and not obscured; and if he failed to do so, and the plaintiff was thereby injured, then she cannot recover." This court held that the instruction asked, or some other applicable to the view of the facts stated, should have been given, and said: "When an obstruction is in the street, in plain view of the driver of a vehicle, and his attention is in no manner diverted so as to excuse him for not seeing the obstruction, and he drives against it or into it, he is clearly guilty of contributing proximately to any injury which may result." It was a case of an obstruction on the surface of the street, against which there

is no presumption. All persons know that temporary obstructions occur on streets and sidewalks; and it is not an unreasonable rule to hold that if in plain sight, and there is nothing to divert the attention of the traveler, he must notice them. The distinction is this: Such obstacles as are known to be present — as, for instance, boxes and barrels on a sidewalk, and vehicles, building material, and rubbish in the street — challenge the attention of the traveler; and if, without excuse, he fails to observe them, and encounters them to his injury, the judgments of men would agree that he was negligent. But matters which he may not anticipate as likely to occur do not challenge such attention; and a failure to observe and avoid them is not, as a matter of law, negligence. It is also true that what might, as a matter of law, be diligence on a sidewalk would not be in driving a team on a public thoroughfare in a city. Greater watchfulness to avoid accident in the latter case is certainly demanded, and for manifest reasons.

From the cases cited, and the reasoning of counsel for appellees, it is quite clear they do not regard the case as one in which the effect of the instruction was to hold, as a matter of law, that the plaintiff was negligent. But as we have stated, such is the effect, because the facts are undisputed; and our holding is, only, that the instruction is erroneous because of such effect. The two special findings, to the effect that the light was sufficient to enable a person to see the opening, and that if plaintiff had looked he could have seen it, do not change the result; for we have considered the case upon the theory of such being the facts. The plaintiff's testimony settled such facts, and special findings were not necessary. Under the rule of the instruction, "ordinary and reasonable care" required the plaintiff to see the opening, as it was plainly visible; and that part of the special finding is without force.

2. Plaintiff offered evidence to the effect that other parties had fallen into the same opening before the plaintiff, and that defendant Mansfield had been informed of the fact. The evidence was refused, and the refusal is made a ground of complaint. The ruling seems to be sustained in *Hudson v. Chicago etc. R. R. Co.*, 59 Iowa, 581; 44 Am. Rep. 692. If it was an original question in this court, some of its members might incline to a different view. There is a decided conflict of authorities on the question.

Some other questions, as to admitting and excluding testimony, are presented, and it seems to us the court must, in some cases, have been governed in its rulings by its view of the law as to the obligation of the plaintiff to see the opening, and with that view were correct. With the view of the law as expressed in this opinion, that the question is one of fact, we have no reason to think the admission of testimony will not be in harmony with the law; and it is unnecessary to notice the numerous questions presented.

3. On behalf of the defendant city, it is urged that in any event it is not liable, because the injury occurred off the usual traveled walk which the city was required to keep in repair, etc. If we concede that, under the unquestioned facts, there is really no cause of action against the city, we do not see, under the state of the record, how we can make orders to that effect. Plaintiff alone appeals. The questions for us arise on his assignments, and they are only as to the admission of testimony and the instructions of the court. If such question had been presented to the court below, and ruled upon, it would have been a basis for an assignment and ruling here.

The judgment is reversed.

CONTRIBUTORY NEGLIGENCE, WHETHER A QUESTION OF LAW OR OF FACT. — Contributory negligence is ordinarily a question of fact to be determined by the jury; but it may be a question of law, determinable by the court, when there is no dispute as to the facts: *Weber v. Kansas City C. R'y Co.*, 100 Mo. 194; 18 Am. St. Rep. 541, and note; *Adams v. Iron Cliffs Co.*, 78 Mich. 271; 18 Am. St. Rep. 441; *Pennsylvania Co. v. Marion*, 123 Ind. 415; 18 Am. St. Rep. 330; *Moakler v. Willamette V. R'y Co.*, 18 Or. 189; 17 Am. St. Rep. 717, and note; *McDonald v. Long Island R. R. Co.*, 116 N. Y. 546; 15 Am. St. Rep. 437; *Goodrich v. New York etc. R. R. Co.*, 116 N. Y. 398; 15 Am. St. Rep. 410; *Barry v. Hannibal etc. R'y Co.*, 98 Mo. 62; 14 Am. St. Rep. 610, and note; *Meloy v. Chicago etc. R'y Co.*, 77 Iowa, 743; 14 Am. St. Rep. 325; *Kansas City etc. R. R. Co. v. Kier*, 41 Kan. 661; 13 Am. St. Rep. 311, and note. In *Cross v. Lake Shore etc. R'y Co.*, 69 Mich. 363, 13 Am. St. Rep. 399, where damages were claimed for an injury caused by falling into a hole near a recognized way used by the public, it was decided that the question of plaintiff's contributory negligence was for the jury to determine.

CONTRIBUTORY NEGLIGENCE, WHAT IS NOT. — Walking upon a defective sidewalk or highway is not necessarily contributory negligence: Note to *Harris v. Township of Clinton*, 8 Am. St. Rep. 850; see also extended note to *Stringer v. Frost*, 9 Am. St. Rep. 878-880, as to the rights of foot-passengers, and when they are guilty of negligence.

NEGLIGENCE — EVIDENCE. — Evidence of previous accidents at the same place are not generally admissible in actions for damages for personal injuries: *Meloy v. Chicago etc. R'y Co.*, 77 Iowa, 743; 14 Am. St. Rep. 325; *Bridge v. Asheville etc. R. R. Co.*, 27 S. C. 456; 13 Am. St. Rep. 653; see also, how-

ever, *Tetherow v. St. Joseph etc. R'y Co.*, 98 Mo. 74; 14 Am. St. Rep. 617; *Myers v. Hudson Iron Co.*, 150 Mass. 125; 15 Am. St. Rep. 176; *Louisville etc. R'y Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432. Evidence that a like accident had been before unknown was held proper in *Doyle v. St. Paul etc. R'y Co.*, 42 Minn. 79. But evidence of other permissive trespasses is incompetent to justify a trespass of a plaintiff who was injured by a railroad train: *Carrington v. Louisville etc. R. R. Co.*, 88 Ala. 472.

DAVENPORT PLOW COMPANY v. LAMP.

[80 IOWA, 722.]

TRUSTS — FOLLOWING TRUST FUNDS IN HANDS OF ASSIGNEE. — Where the treasurer of one corporation is induced by the president of another to discount a note executed by it to the first-named corporation, and to pay it the proceeds, which are used in its business, under the promise of such president, who is fully informed that such treasurer has no authority to make the transaction, that the money shall be repaid by a certain time, the money so advanced becomes a trust fund in the hands of the corporation to which it is loaned; and if it afterwards becomes insolvent, and assigns for the benefit of creditors, the creditor corporation may enforce the trust against the property in the hands of the assignee, to the exclusion of other creditors of the assignor.

Bills and Haas, for the appellant.

W. K. White and Nathaniel French, for the appellee.

BECK, J. 1. There is no controversy as to the controlling or important facts of the case, which may be briefly stated. The plaintiff and the Globe Plow Works are each corporations. The plaintiff was settling up its affairs, having ceased the manufacturing business. It held notes executed by the Globe Plow Works, which were in the possession of its treasurer, who was induced by the president of the other corporation to discount one of them and pay the proceeds, amounting to more than five thousand dollars, to the Globe Plow Works, which was used in its business and the payment of debts. The transaction was in the nature of a loan to the Globe Plow Works. Its president promised to see the money repaid to plaintiff within a term specified. The treasurer of plaintiff had no authority to pay the money to the Globe Plow Works, or to make a loan to it. The Globe Plow Works made an assignment for the benefit of its creditors, the defendant being the assignee. The court below rendered judgment giving preference for a part of plaintiff's claim, on the ground that certain payments were made to creditors having the right to preference, which would require their claims

to be first paid by the assignee. It was held that plaintiff, for the balance of his claim, was entitled to no further preference; but an order was made for the *pro rata* payment thereof, with all other claims established before the assignee.

2. It cannot be doubted that the Globe Plow Works held the money subject to the trust with which the treasurer of plaintiff was charged. The president of the Globe Plow Works, who induced the treasurer of plaintiff to advance money, was fully informed that the funds belonged to plaintiff, and the treasurer had no authority to loan or advance them to the Globe Plow Works or its president. The funds came into the hands of that company charged with the trust under which it was held by the treasurer of plaintiff.

It cannot be doubted that plaintiff could, by action, have recovered the funds from the Globe Plow Works. Such recovery would not be as for a debt, but for money received subject to a trust in favor of plaintiff or the *cestui que trust*. The right of recovery would not depend upon the ability of plaintiff to trace the money, the identical coins paid by its treasurer, and discover them in the hands of the Globe Plow Works. That right is based upon the facts that trust funds came into its hands, of the trust character of which it had full knowledge. The trust attached to the money, and the Globe Plow Works became liable as having received, and as holding, trust money. The money was used by the Globe company in its business, and in payment of its debts. It became liable to the plaintiff to replace the trust funds with other money in its possession, or with money realized out of other property. Of course, the Globe company and its stockholders can urge no equity nor reason against the enforcement of these rules. Can its creditors? We think not, for these reasons: The money was wrongfully mingled, as it were, with the assets of the company. The money did not belong to the Globe company. The creditors, if permitted to enforce their claims as against the trust, would secure the payment of their claims out of trust moneys. If they are not permitted to do this, they are simply denied the remedy of enforcing their claims against property acquired by the use of trust money. They are deprived of no right; for the property acquired by the trust money became subject to the trust, and therefore could not have been subject to the claims.

3. It cannot be doubted that the assignee has no higher claim to the property than the assignor; as to which he stands

in the shoes of the assignor. This position we do not understand is questioned in this case. It may be admitted that the assignee is the representative of the creditors, whose duty it is to devote the assets of the assignor to the payment of his debts. But his rights can be no higher than the rights of creditors. See, in support of these views, the following authorities: 1 Story's Eq. Jur., sec. 533; 2 Story's Eq. Jur., secs. 1038, 1228, 1411; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54, and cases therein cited; *People v. City Bank*, 96 N. Y. 32; *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215; *McLeod v. Evans*, 66 Wis. 401; 57 Am. Rep. 287; *Francis v. Evans*, 69 Wis. 115; *Bowers v. Evans*, 71 Wis. 133; *Peak v. Ellicott*, 30 Kan. 156; 46 Am. Rep. 90; *Thompson v. Gloucester Savings Inst.*, 8 Atl. Rep. 97, N. J., Feb. 17, 1887. Other cases supporting our view are cited in the foregoing decisions, especially in the first of the last one just cited. *Lowry v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114, and *Long v. Emsley*, 57 Iowa, 12, are not in conflict with these conclusions. In the first-named action a county treasurer sought to relieve himself of liability for county money deposited in a bank, without authority of law, which was lost by the failure of the bank. It was held that he was entitled to no such relief, for the reason that the bank, by the deposit, became the debtor of the county treasurer, and that as he failed to lawfully dispose of the money, he is liable to the county. In the second case a township clerk deposited money to his own individual credit in a bank, which was garnished as his debtor on account of the deposit, and judgment rendered against it, and thereon it paid the judgment to the agents of the creditors, who were bankers. The township clerk sought to recover the money from the last-named bankers. The case was decided against plaintiff on the ground that the money became his individual property upon making the deposit, and that the bankers receiving the deposit became the owners of the money and debtors of plaintiff. The money on being paid on the garnishee judgment passed to the bankers receiving it for the creditors.

It will be observed that it is not shown in the first case that the *cestui que trust*, the county, — the real party in interest, owning the money, — sought to pursue it in the hands of the defendants. The plaintiff sought to recover the money, doubtless to relieve himself of liability on his official bond, or otherwise. In the last case the money was paid to the last

bankers, the agents of the creditors, on a judgment in a garnishment proceeding to which the plaintiff (the township clerk) was a party. We need not determine whether there are better reasons for the decisions than those given therein. They are not in conflict with the conclusions we have just announced, which lead us to the conclusion that the district court erred in not rendering judgment for plaintiff for the full amount of its claim, as shown by the evidence, which should have priority over all other claims. The cause will be remanded to the district court for further proceedings in harmony with this opinion.

Reversed.

TRUSTS — FOLLOWING TRUST FUNDS. — Trust funds may be followed so long as they can be traced: *First Nat. Bank v. Hummel*, 14 Col. 259; *ante*, p. 257, and particularly note.

McMARSHALL v. CHICAGO, ROCK ISLAND, AND PACIFIC RAILWAY COMPANY.

[80 IOWA, 757.]

NEGLIGENCE — INSTRUCTIONS. — Where, in an action to recover for personal injury to a railway employee from being struck by the locomotive of another company, it is alleged that defendant was negligent because its engine was managed and controlled by incompetent employees, who failed to see the injured party in time to give alarm signals, and it is shown that the place of accident was a railroad yard in a city, used by several companies together, whose tracks were in close proximity to one another, an instruction that if the injured employee was in the discharge of his duties at the time of the accident, and the employees of defendant were not on the lookout, and had its engine in the possession of or under the control of an incompetent person, it would be guilty of negligence, is proper and unobjectionable.

NEGLIGENCE — FAILURE OF RAILROAD EMPLOYEE TO "LOOK OUT." — Where, in an action to recover for personal injuries from being struck by a railroad engine, it is shown that several persons at the scene of the accident, not charged with the duty of watching the track, saw the injured party before he was struck, it may be inferred that the party operating the engine, who was charged with the duty of watching the track, did not "look out," and was therefore guilty of negligence.

NEGLIGENCE — INCOMPETENCY OF FIREMAN. — Where, in an action to recover for injury in being struck by a railroad engine, it is shown that, at the time of the accident, such engine was in charge of a fireman, this fact, in connection with a failure to promptly stop the engine, tends to show the fireman's incompetency as an engineer, and the negligence of his employer.

NEGLIGENCE — FAILURE TO SIGNAL. — Where, in an action to recover for injury from being struck by a railroad engine, the evidence is conflicting on the issue of defendant's negligence in failing to give proper signals by ringing the bell, it is properly submitted to the jury as an issue of fact.

RAILROADS — NEGLIGENCE — PERSON ON TRACK. — In an action to recover for injuries received by the employee of one railroad company by being struck by the engine of another, an instruction that joint occupancy of ground for railroad purposes by two or more companies will impose on each the duties to the employees of the other necessarily using the track which it owes to its own employees is not erroneous as assuming that the occupancy of the ground in the case before the court was joint, and that the use of the track by the injured employee was necessary.

RAILROADS — NEGLIGENCE OF EMPLOYEE ON TRACK — DUTY TO LOOK AND LISTEN. — Where, in an action to recover for injuries to an employee of one railroad company from being struck by the engine of another, it is shown that the tracks of the two companies were very close to each other; that such employee and the other employees of his company were accustomed to step upon the track of the defendant company to make signals, which were necessary to the protection of both companies; that this custom was acquiesced in and not objected to by the defendant company; and that such employee had stepped upon its track for the purpose of signaling at the time of the accident, — he was not a trespasser so as to preclude him from recovering, nor does the rule that a person on the track is required to "look and listen" apply in such a case.

VERDICT. — **FAILURE TO PASS ON SPECIAL ISSUES** will not vitiate a general verdict supported by evidence on other points involving the same questions.

RAILROADS — DUTY TO EMPLOYEES OF DIFFERENT COMPANIES IN COMMON SWITCH-YARD. — Where a common switch-yard is used by different railroad companies, each having its own track passing very close to each other, each company owes the same duty as to care to the employees of the other necessarily upon its track in the discharge of their duty as it owes to its own employees upon its own track under similar circumstances.

RAILROADS — UNDUE SPEED IN VIOLATION OF ORDINANCE AS NEGLIGENCE. — In an action to recover for injury from being struck by a railroad engine, proof that it was being run at a rate of speed in violation of a city ordinance at the time of the accident is evidence of negligence, when the jury is justified in finding that the engine might have been stopped in time to avoid the accident if it had been running at a slower rate of speed and that the injured party trusted to defendant's employees to run the engine at lawful speed.

DAMAGES FOR NEGLIGENCE — INSTRUCTIONS. — In an action to recover for injury from being struck by a railroad locomotive, through the negligence of the company, an instruction that plaintiff is entitled to such reasonable sum as damages as his injury occasioned, but not to find for more than the sum claimed in the complaint, is proper, and not erroneous as directing the jury to find for the full sum claimed.

Thomas S. Wright, and Craig, McCrary, and Craig, for the appellant.

Dodge and Dodge, A. H. Stutsman, and James C. Davis, for the appellee.

BECK, J. 1. Plaintiff's intestate, A. L. Kern, was in his lifetime in the employment of the St. Louis, Keokuk, and Northwestern Railroad Company as a train conductor. He was in charge of a train engaged in moving ice from the canal above the defendant's railway station at Keokuk to an ice-house below. At the time of the accident he detached the engine from the cars in his train, and coupled it "head on" to some box-cars. The defendant had a track a few paces south of the track of the St. Louis, Keokuk, and Northwestern railroad, upon which the intestate stepped for the purpose of giving or receiving signals from the engineer, or the person in charge of the engine. Defendant's switch-engine, which was at the time approaching, struck the intestate, causing his death. The tracks upon which the intestate's train was stopped, and the one upon which he was struck by defendant's engine, were seven or eight feet apart, and were used by the railroad company, whose road entered Keokuk, for the purpose of switching, and the locality is called the "Union railway yards" of the city. The petition sets out the cause of action in the following language, which we quote for the reason that certain questions discussed by counsel arise upon the allegations of the petition. After stating that defendant sues as administrator of Kern, the petition proceeds to allege "that on the 11th of January, 1887, said Kern was a railway conductor, operating a train on the St. Louis, Keokuk, and Northwestern railroad, and while in the discharge of his duties in the Union railway yards in the city of Keokuk, and while in the exercise of ordinary care and caution, was struck, run over, and killed by a switch-engine belonging to defendant, and operated and run in said yards, on one of defendant's tracks therein, in a grossly careless and negligent manner, in that the kind of engine used was unskillfully constructed, so as to prevent a person on the track in front of said engine being seen by persons in charge thereof, and in not being equipped with proper appliances to enable the speed to be checked within a reasonable time and distance, and in that the said engine was run at a high and unlawful rate of speed; and in that the same was managed and controlled by incompetent employees; and in that the said employees failed to see said deceased in time to give any alarm signal, and failed to give the usual and necessary signals of approaching danger, so as to warn deceased of the approach of said engine; that deceased was about thirty-five years of age, a skilled work-

man, capable of earning large sums of money, and of sound health and industrious habits. Wherefore complainant claims judgment for the sum of twenty-five thousand dollars." The answer, in general language, denies all the allegations of the petition.

2. The questions raised in the case may be more briefly and conveniently discussed by considering them in the order of their presentation by defendant's counsel.

The first objection argued by defendant's counsel is directed at the eighth instruction given by the court to the jury, which is in this language: "The degree of care to be exercised by a railroad company must necessarily depend upon the location of the track and the circumstances of the case. In a place not frequented by the public, either by right or permission, expressed or implied, of the company, and in locations where people are not constantly passing about, and where they cannot reasonably be expected to be, persons in charge of a train are not required by law to be on the lookout for them. In such cases, the company is entitled to the exclusive use of the track, and the persons in charge of the train are only required to avoid injury to them if they can do so upon becoming aware of their peril. But when the place is within the limits of a city, in the yard of a company, or yard used by several companies together, or with tracks in close proximity to each other, and employees of companies whose tracks are in close proximity are engaged in the discharge of their duties, the safety of human life requires a different rule; and in this case, if you find that deceased was an employee of one of said roads in the line of his duty, and the employees of defendant were not on the lookout for such persons, and had their engine in possession or under the control of an incompetent person, if it was, and were running at a dangerous and unlawful rate of speed, if it was, and the injury was inflicted by reason of the want of proper care on the part of the defendant, if it was, the defendant would be guilty of negligence." It is insisted that this instruction is erroneous, in that it submits to the jury two questions of negligence, thus stated by defendant's counsel: "1. Whether defendant's employees were on the lookout for persons on the track; and 2. Whether defendant's engine was in the control of an incompetent person." The error of the instruction, in counsel's view, is, that the petition is specific in its allegations of negligence, and as there were no allegations as to the facts suggested by these questions, the inquiries

should not have been submitted to the jury by the instruction; in other words, as there were no specific allegations of negligence to the effect that defendant's employees "were not on the lookout," and the engine was not in the control of an incompetent person. As to the first part of the objection, the petition alleges that defendant's employees "failed to see the intestate in time to give any alarm signal." Now, if the employees were not on the lookout, they surely failed to see deceased. A failure to "look out" was, in effect, a failure to see deceased. If the employees failed to look out, they negligently failed to see the deceased. It will be observed that the court quite correctly directed the jury as to the duty of the defendant's employees, at the place where the accident happened, "to look out" for persons on the track. The negligence alleged in the petition is a failure to see intestate. "A failure to see" would follow "a failure to look out." Hence the negligence set out in the petition and the instruction is the same, as it is the result of the same omission.

3. It is asserted that there was no evidence that defendant's employees failed "to look out." Surely, if other persons at the scene of the accident, not specially charged with the duty of watching the track before the engine which struck intestate, saw him before he was struck, the employees operating the engine, it could well be inferred, did not "look out." If they had been watching the track they would have seen him. They, therefore, did not look out.

4. The man in charge of the engine was a fireman. This fact, together with the failure to promptly stop the engine, either because it was running at too high rate of speed, or because he was not capable of stopping it with promptness, tend to show his incompetency as an engineer.

5. Counsel maintain that the court erred in submitting the issue to the jury involving the question whether signals were given. Upon this point there is a conflict of evidence. Defendant's witnesses testify the bell was rung. Two witnesses at the scene of the accident testify that they did not hear it. The issue was rightly submitted to the jury.

6. An instruction — the ninth — directed the jury, in effect, that a joint occupancy of ground for railroad tracks by two or more companies will impose on each the duty to the employees of the other necessarily using the tracks which it owed to its own employees. This instruction is complained of on the ground that it assumes the fact that the occupancy

of the ground was joint, and the use by the employees was necessary. We do not so understand it. The instruction well stated the principle of law as a formula. The jury could by no possibility have understood that they were instructed as to the facts.

7. The twelfth instruction, which is complained of by defendant, is in this language: "If you find from the evidence that the deceased and other employees of the St. Louis, Keokuk, and Northwestern Railway Company had, for a considerable time prior to the accident, been accustomed to use the track of the defendant railroad company at and near the place where the accident occurred for the purpose of using the same for giving signals by the acquiescence of the company, then the deceased was not a trespasser upon the track, and such permission may be implied if the deceased and other employees of said St. Louis, Keokuk, and Northwestern Railway Company were in the habit of so using the railroad of defendant without objections on its part; and it is for you to determine, from all the facts in evidence before you, whether or not deceased had such permission." The instruction is clearly correct. It contemplates a state of facts showing that the intestate was on the track under a custom authorizing signals by employees of the other roads to be made therefrom. These signals were for the protection and security of life and property, — of the lives of defendant's employees, and of defendant's property, as well as for the safety of the property and security of the employees of the other railroad company. When tracks of two or more railroads are so near together, or are crossing or running into one another, the safety of all persons concerned in operating the road at that point, and the protection of the property of all the companies, demand that signals should be fully given, and authority to use the different tracks is inferred. It would be absurd to hold intestate a trespasser or negligent in doing just what defendant's employees have done, and ought to continue to do. The cases cited by defendant's counsel in support of his position on this point do not contain the element that the persons on the track were other railroad men, whose duty called them there for the protection of the life and property of the railroad company whose track was used in the discharge of that duty.

8. Certain questions were asked the jury, their answers to be regarded as special findings. The questions and answers

are as follows: "1. Could A. L. Kern have seen the engine of defendant company if he had looked in the direction of its approach at the time he stepped onto the track? A. We cannot say. 2. Did Kern look in the direction of the approaching engine when he stepped on the track? A. We do not know."

Counsel think the failure of the jury to answer the questions vitiates the general verdict. We are of the contrary opinion. The answers are to be understood as a reply to the effect that there is no evidence upon the point. Now, in the absence of such evidence, the jury could have found proper care exercised by deceased upon other evidence. The duty he had to discharge, requiring him to go on defendant's track, the duty of defendant to run its trains slowly at the place, and the like, being considered, may have been sufficient to authorize the jury to find that intestate went upon the track in the exercise of due care. The special finding, or rather the failure of the jury to return special findings, is not inconsistent with the general verdict; for had the answer been explicit and categorical, one way or the other, the verdict would have stood.

9. Counsel for the defendant insist that "the use of defendant's track in signaling employees of the St. Louis line is not competent evidence of any right to do so." We are clearly of the opinion that the use of the track, under the circumstances that at the place were other tracks used by other companies; that it was near a station; that the rate of speed should be, and was, low; that the length of the train required the party at one end, who signaled to the other, to go some distance from the train, so that he could be seen, and that the signaling was for the safety of employees and the protection of property, both of defendant and the other railroads using the tracks; and other circumstances, — all require us to hold that the defendant owed to the intestate the same duty it would have owed to one of its own employees, had he gone upon its track at the place to give signals in the discharge of his duty. Public policy, humanity, and a due regard to property rights of the railroads lead to this conclusion.

10. The tenth and eleventh instructions are to the effect that the rule requiring one going on a railroad track "to look and listen" does not apply to this case. We have pointed out the distinction between this case and that where mere trespassers or idlers go upon tracks. The intestate was by duty required to go upon the track. Defendant's employees were

by duty required to "look out" for the intestate, and to see to it that he should not be run down and killed while serving not only his own employers, but serving the safety of defendant's employees and its property.

11. An instruction is to the effect that a speed in violation of the city ordinance is evidence of negligence. It is said that this is erroneous, because it does not appear that the unlawful speed caused the injury. The jury could well have found that the train could have been sooner stopped if running at a lower rate of speed, and that the intestate trusted that defendant's employees would run the train at a lawful rate of speed. He was thus invited to his destruction by defendant's negligence.

12. An instruction directed the jury that "plaintiff is entitled to such reasonable sum as damages as the death of Kern has occasioned, . . . but in no event can the sum exceed twenty-five thousand dollars, the sum claimed." Counsel for defendant think this was a direction to find in the sum of twenty-five thousand dollars. We think no jury could have been misled by failing to understand this instruction. Its meaning is apparent. It directs the jury not to find more than the sum claimed.

13. The verdict is sufficiently supported by the evidence. These considerations dispose of all the questions in the case, and lead us to the conclusion that the judgment of the district court ought to be affirmed.

RAILROAD COMPANIES, DUTY OF, AS TO PERSONS UPON TRACKS. — *Generally.* — Railroad companies, in operating their trains, must use the care and caution that prudent men would be expected to use under similar circumstances: *Gulf etc. R'y Co. v. Hodges*, 76 Tex. 90; *International etc. R'y Co. v. McDonald*, 75 Tex. 42; *Sobieski v. St. Paul etc. R'y Co.*, 41 Minn. 169. They must also observe statutory requirements, such as giving warning of the approach of their trains, by signals, etc.: *Carrington v. Louisville etc. R. R. Co.*, 88 Ala. 472; *Illinois C. R. R. Co. v. Slater*, 129 Ill. 91; 16 Am. St. Rep. 242, and note 247, 248; *Webb v. Railway Co.*, 88 Tenn. 119; *Lewis v. Galveston etc. R'y Co.*, 73 Tex. 504; *Abbot v. Dwinnell*, 74 Wis. 514. Where one who appears to have his senses and to be able to take care of himself is seen upon the track, the train-men may presume that he will heed the warning signals, and leave the track in time to prevent his injury: *Artusy v. Missouri Pac. R'y Co.*, 73 Tex. 191. The company is not required to keep the space between its tracks free from ice and snow: *Silberstein v. Houston etc. R. R. Co.*, 117 N. Y. 293. The burden of proof is on the company to disprove its negligence, either by showing a compliance with the statutory requirements or that the injury could not have been avoided by such compliance: *Georgia P. R'y Co. v. Hughes*, 87 Ala. 610.

Operating Trains at an Undue Rate of Speed. — Railroad companies must slacken the speed of their trains at public crossings only when it is necessary to do so to prevent injuries or accidents: *Connyers v. Sioux City etc. R. R. Co.*, 78 Iowa, 410; *Robinson v. Flint etc. R. R. Co.*, 79 Mich. 323; 19 Am. St. Rep. 174. Ordinarily, negligence will not be inferred from the rate of speed alone: *Dyson v. New York etc. R. R. Co.*, 57 Conn. 9; 14 Am. St. Rep. 82; but the speed must not be such as to prevent an operation of the train in a careful manner: *Connors v. Burlington etc. R'y Co.*, 74 Iowa, 383; nor must trains be run at a high rate of speed in cities, fair-grounds, and places where numbers of men and women are continually near the tracks: *Peyton v. Texas P. R'y Co.*, 41 La. Ann. 861; 17 Am. St. Rep. 430, and note; *Chicago etc. R'y Co. v. Dunleavy*, 129 Ill. 133; for increased vigilance must always be used to prevent accidents while trains are moving in or through a city or town: *Shelby v. Cincinnati etc. R. R. Co.*, 85 Ky. 224.

Duty to Persons Who are not Trespassers. — It cannot be said that a railroad company owes no duties to persons who are rightfully upon its track: *Chicago etc. R'y Co. v. Dunleavy*, 129 Ill. 132. In *Whalen v. Chicago etc. R'y Co.*, 75 Wis. 654, where, in the dusk of evening, at a place where the company knew many persons were likely to be upon or near the track, a freight train backed slowly, with little noise, down the track, and injured a boy thirteen years of age, the employees were held to have been guilty of negligence in not keeping a lookout at the rear of the backing train. So employees working upon or near a track must be warned of approaching trains by proper signals: *Erickson v. St. Paul etc. R'y Co.*, 41 Minn. 500. But the employees may be guilty of contributory negligence, even when a train approaches without giving the customary signals: *Sobieski v. St. Paul etc. R. R. Co.*, 41 Minn. 169.

Duty to Persons Who are Trespassers. — Trespassers who go upon an open railroad track do so on their own risk of such dangers as are liable to meet them: *Sturgis v. Detroit etc. R'y Co.*, 72 Mich. 619; and except at public crossings, and in cities, towns, villages, and such places, the company need not keep a special lookout for trespassers on the track, being only required to exercise reasonable care towards them after they are discovered: *Carrington v. Louisville etc. R. R. Co.*, 88 Ala. 472; *Louisville etc. R. R. Co. v. Black*, 89 Ala. 313; *Rine v. Chicago etc. R. R. Co.*, 100 Mo. 228; *Baltimore etc. R'y Co. v. State*, 71 Md. 591; *Louisville etc. R. R. Co. v. Coleman*, 86 Ky. 556; *Barker v. Hannibal etc. R. R. Co.*, 98 Mo. 50; *Sibley v. Rutliffe*, 50 Ark. 477. In *McDonald v. Chicago etc. R'y Co.*, 75 Wis. 121, where one having got upon the track at night at a public crossing continued to drive along the track for two miles, there being nothing to prevent him from leaving it, it was decided that he was guilty of such negligence as would bar his recovery for injuries sustained from a passing train.

A railroad track, of itself, is a warning of danger to persons, and upon approaching it they must look and listen, before venturing to go upon it: *Matta v. Chicago etc. R'y Co.*, 69 Mich. 109; *Freeman v. Railway Co.*, 74 Mich. 37; *Randall v. Railroad Co.*, 104 N. C. 410; *Chicago etc. R'y Co. v. Dunleavy*, 129 Ill. 136; *Miller v. St. Paul etc. R'y Co.*, 42 Minn. 454.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

BALTIMORE AND OHIO RAILROAD COMPANY *v.* STATE.
USE OF WILEY.

[72 MARYLAND, 36.]

CONTRIBUTORY NEGLIGENCE. — A postal clerk who while off duty and returning to his home is entitled to ride in defendant's passenger-cars, but who while on duty was required, and when off duty was permitted, to ride in a postal-car, and who while there riding is killed by a collision, is not to be held guilty of contributory negligence as a matter of law, precluding any recovery for his death, though he was not on duty at the time, and had he remained in the passenger-car his position would have been less dangerous, and he would probably not have suffered any injury.

W. Irvine Cross, for the appellant.

Henry V. D. Johns, for the appellee.

IRVING, J. This suit was brought in the name of the state, for the use of Lucy A. Wiley and others, to recover damages for the death of William H. Wiley, husband and father of the equitable plaintiffs, occasioned by collision of appellant's trains going in opposite directions. The negligence of the appellant's officers is conceded, and appellant relies wholly on what it claims to have been contributory negligence on the part of the deceased as its defense to the action.

The deceased was chief postal clerk in the United States railway mail service. He held what is known as a "photograph commission" from the government. His route was from Baltimore to Grafton. He was entitled, under his commission, to ride as a passenger on the appellant's trains, by virtue of his commission, while in the active discharge of duty, or in

going from and returning home. At the time of the accident he was not in active duty, but was returning to his home until he should be called to duty again, in a few days. He rode on the occasion of the accident, in the smoking-car, from Baltimore to Washington; and the conductor saw and recognized his commission as entitling him to ride in the cars; and the conductor testifies he did not see him any more. He had left the smoking-car, and gone into the postal-car, where, after chatting a while with those on duty in that car, he lay down upon the mail-matter and went to sleep. The collision came. The postal-car was crushed, and the dead body of the deceased was found in the *débris*. The witnesses say if he had remained in the smoking-car he would probably not have been killed, as nobody in it was hurt. His presence was not required in the postal-car, as he was off duty and returning home, subject to call into active service within six days, or sooner if needed. The evidence shows that no one was allowed to ride in the postal-car but such as had a photographic commission or a permit; and those who only had the permit had to pay fare. It was the custom of the conductor to allow persons holding photographic commissions to ride either in the postal-car or in any part of the passenger-cars. Sometimes they would ride in one and sometimes in the other; and the conductor testifies he made no objection. The conductor was not admitted into the postal-car, but it was the duty of the postal clerk in charge there to report to him the presence of any one chargeable with fare; and that when notified that clerks not on duty were in that car, he made no objection. It was also in proof that the deceased had, before that time, upon his photographic commission, been permitted, on previous occasions, to ride in the postal-car when going on or returning from duty. Two exceptions were taken to the admission of evidence as to the custom of the conductor in giving permission of that sort, but they were waived at the hearing in this court; so that the sole question intended to be raised by those exceptions is left as presented by appellant's prayer, which goes to the effect of that evidence. It was rejected by the court below. That prayer is as follows, viz.: "If the jury find that the deceased, at the time of his death, was a clerk in the railway mail service, and on the 6th of October last entered the train of the defendant at Baltimore, and rode to Washington in the smoking-car attached to said train, and upon reaching Washington he left the smoking-car and en-

tered the postal-car at Washington attached to said train, as testified to by the witness Atkinson, and continued to remain in said postal-car until the time of the accident, and was in said car when he met his death, and that from its position in the train the postal-car was subject to greater risk of danger than the cars intended for the transportation of passengers and further find that when said deceased entered said postal-car he was not on duty as postal mail clerk, and had no official duties to discharge in said car, but was returning to his home, at Grafton, where he would have remained six days, unless sooner called into active service, and that if the deceased had remained in the smoking-car, or been seated in any other car attached to said train intended for the transportation of passengers, he would not have been killed, then their verdict must be for the defendant, notwithstanding the jury may further find that the deceased had with him a pass, in the evidence called a photographic commission, entitling him to free transportation on said train, which was offered in evidence by the plaintiff."

In effect, this prayer asked the court to say, as matter of law, that notwithstanding the postal-car was the place where the plaintiff ordinarily remained, and was required to remain as a passenger, when in the discharge of his postal duties, still, if he was not in the discharge of his official duty, it was fatally contributory negligence for him to be in that car, although the conductor was in the habit of allowing him to be in that car when returning to his home when he was not on duty. We know of no case which would justify such a ruling. Both reason and authority lead us to think the ruling of the circuit court was entirely right in rejecting this prayer.

It may be that the location of the postal-car was, by reason of its greater proximity to the engine, a place of greater danger than the smoking-car or other passenger-cars. Still, it was a car for the occupancy of passengers who were entitled to ride as such because of their official position or connection with the post-office department of the government, or who paid their fare and were connected with that department. There was no rule of the company forbidding the deceased to enter that car and occupy the same if he was not in actual service. It was his habit to occupy it, when he was returning from duty, whenever he chose, and the conductor, who is conceded to be a general agent of the company, not only made no objection, but permitted him from time to time to do so. There

are cases, no doubt, where the invitation or permission of the conductor would not protect a man in running a risk which was so obviously dangerous that a prudent man would not think of incurring it: Patterson on Railway Accident Law, sec. 276, and cases cited. To justify a court in saying that conduct is *per se* contributory negligence, the case must present some such feature of recklessness as would leave no opportunity for difference of opinion as to its imprudence in the minds of ordinarily prudent men: *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 21; 9 Am. St. Rep. 387; *Cumberland Valley R. R. Co. v. Maugans*, 61 Md. 61; 48 Am. Rep. 88; *Baltimore etc. R. R. Co. v. Fitzpatrick*, 35 Md. 46; *Baltimore etc. R. R. Co. v. State, Use of Stansbury*, 54 Md. 655. Here the deceased was doing what he was actually required to do for the larger part of his time on the cars, and was permitted to do the rest of his time when on the cars. It was provided for his occupancy when on duty as postal clerk, and his not being on duty did not make the car more dangerous to him. His act, therefore, in no way contributed to the result which happened. A case precisely like it, being the case of a postal clerk not on duty, and in the postal-car, and injured while there by the gross negligence of the company's agents, is found in *Carroll v. New York etc. R. R. Co.*, 1 Duer, 578. The plaintiff in that case was in the postal-car by the permission of the conductor, and was allowed to recover damages. The same principles were given effect in *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Pa. St. 239; 98 Am. Dec. 336, and in *Creed v. Pennsylvania R. R. Co.*, 86 Pa. St. 139; 27 Am. Rep. 693. In the last case the court says no legal presumption of negligence can arise from the fact that the passenger was in a car not intended for passengers. In *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 27, 37 Am. Rep. 651, cited by appellant's counsel, there was an emphatic rule of the company forbidding a passenger to ride in a baggage-car, which was controlling. We can find nothing in the decided cases inconsistent with the view entertained by the circuit court in rejecting the appellant's prayer, and the judgment will be affirmed.

CARRIERS — PASSENGERS — NEGLIGENCE. — The general rule is, that one who is entitled to ride in a passenger-car, but rides in some other car, where he has no right to be, such as the mail-car, express-car, or baggage-car, cannot recover for injuries sustained by him in a collision, where it appears that he would have escaped injury had he remained in the passenger-car: *Bricker v. Philadelphia etc. R. R. Co.*, 132 Pa. St. 1; 19 Am. St. Rep. 585, and note; *Blake v. Burlington etc. R'y Co.*, 78 Iowa, 58.

In the case of *Jones v. Chicago etc. R'y Co.*, 43 Minn. 279, it was decided that the fact that a passenger, when injured, is in the baggage-car, where, under the company's rules, he has no right to be, does not constitute such negligence on his part as will defeat his recovery for injuries sustained, provided his being in such car did not contribute to or aggravate the injury received.

STATE, USE OF BASHE, v. BOYCE.

[72 MARYLAND, 140.]

ABATEMENT, PLEAS IN. — WHEN TWO SUITS ARE FOR THE SAME CAUSE of action, and between the same parties, the pendency of the first may be pleaded in bar to the second. The identity of the subject-matter and of the parties must be alleged.

JOINT TORT-FEASORS, ACTIONS AGAINST. — If two or more persons jointly commit an actionable tort, the injured party may join them in one action, or he may have a separate action against each, though he can have but one satisfaction. Nothing short of the satisfaction of a judgment against one, or his release, will operate to prevent a recovery by the same plaintiff against another joint trespasser in an action founded on the same tort.

PLEA IN ABATEMENT THAT ANOTHER ACTION IS PENDING by the same plaintiff against one who is jointly guilty with defendant of the commission of the tort for which plaintiff seeks to recover is not sustainable.

JOINT WRONG-DOERS, SEPARATE ACTIONS AGAINST. — STATUTE AUTHORIZING ACTION TO BE BROUGHT FOR the use of a wife, husband, parent, and child of a person whose death has been caused by negligence, and declaring that no more than one action shall lie for and in respect of the same subject-matter of complaint, does not prevent the maintenance of several distinct actions against several different persons, whose joint negligence caused the death for which recovery is sought.

J. Alexander Preston, for the appellant.

W. Cabell Bruce, for the appellee.

McSHERRY, J. There is but a single question involved in this appeal. It arises upon the following facts: The appellee owned a wharf, which was under lease to the Consolidated Coal Company. By reason of the wharf being, as alleged, out of repair, Joseph Bashe was injured, and shortly afterwards died from the effects of that injury. The widow, children, and mother of the deceased brought suit against the coal company, the lessee of the wharf, and whilst that suit was still pending and undisposed of, they brought another action, for the same cause, against the appellee, the owner of the wharf. Both suits were instituted in Baltimore City. To the declaration filed in the second action the appellee pleaded

in abatement the pendency of the prior suit against the coal company. The appellants demurred to the plea, and the Baltimore City court entered judgment on the demurrer for the appellee. From that judgment this appeal has been taken.

In support of the plea, reference was made by the appellee to 1 Chitty's Pleading, 100, *Boyce v. Bayliffe*, 1 Camp. 60, and *Raulinson v. Oriett and Benson*, Carth. 96. The text of Mr. Chitty relies only on the case in 1 Campbell, which was decided by Lord Ellenborough at *nisi prius*. The case in Carthew states that Holt, C. J., *dubitabit*, but the other three judges inclined that the plea was good.

Much as we respect the opinion of Mr. Chitty, we think the great weight of authority is against the sufficiency of the plea.

The general rule is this: Where the two suits are for the same cause of action, and between the same parties, the pendency of the first may be pleaded in abatement of the second. The identity of the subject-matter and of the parties must be alleged: Poe's Pleading, 502; *Cook v. Burnley*, 11 Wall. 659; *Bryan v. Scholl*, 109 Ind. 367; and the two suits must be pending in the courts of the same state: *Seever v. Clement*, 28 Md. 426. Now, whilst the cause of action is alleged to be the same in both suits, the defendants are admitted by the plea to be different; and therefore the plea is undoubtedly bad, unless an exception to the general rule obtains in the case of joint tort-feasors. No reason is perceived for the existence of such an exception, and no authorities have been cited to support it, other than those already alluded to. It may be regarded as very generally accepted law in this country that where two or more persons jointly commit an actionable tort, the injured party may join them all in one action, or he may bring a separate action against each, though he can have but one satisfaction. He has his election *de melioribus damnis*. Nothing short of the satisfaction of a judgment obtained against one, or his release, will operate to defeat a recovery by the same plaintiff against another joint trespasser in a subsequent action founded on the same tort: *Lovejoy v. Murray*, 3 Wall. 1; *Sheldon v. Kibbe*, 3 Conn. 214; 8 Am. Dec. 176; *Morgan v. Chester*, 4 Conn. 387; *Sanderson v. Caldwell*, 2 Aiken, 195; *Blann v. Crocheron*, 20 Ala. 320; 54 Am. Dec. 203; *Du Bose v. Marx*, 52 Ala. 506; *Knott v. Cunningham*, 2 Sneed, 204; *Page v. Freeman*, 19 Mo. 421;

Elliott v. Hayden, 104 Mass. 180; *Woods v. Pangburn*, 75 N. Y. 498. Why, then, should the mere pendency of another suit, which has not yet even ripened into a judgment, and which may never do so, abate a subsequent suit against a different joint tort-feasor for the same trespass? No satisfactory reason can be given to support any such distinction. The principle governing the question involved here is clearly stated in *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330, in the opinion delivered by Kent, C. J. That case was sanctioned and approved in *Lovejoy v. Murray*, 3 Wall. 1, and referred to by this court in *Gunther v. Lee*, 45 Md. 66.

It was suggested at the argument that article 67, section 2, of the code allows but one action to be brought for the same injury in cases of this character. This statute, which gives a right of action in the name of the state for the use of the wife, husband, parent, and child of a person whose death has been caused by negligence, provides "that not more than one action shall lie for and in respect of the same subject-matter of complaint." It permits but one suit to be instituted against the same defendant for an injury resulting in death; and therefore all who have a right to unite as plaintiffs, but who omit to become parties, are excluded from bringing a subsequent action: *Deford v. State*, 30 Md. 208. Its object was to protect a defendant from being vexed by several suits instituted by or in behalf of different equitable plaintiffs for the same injury, when all the parties could, with perfect convenience, be joined in one proceeding. It never contemplated depriving a plaintiff of the right to sue, separately, different joint tort-feasors, though of course there can be but one satisfaction, no matter how many judgments can be recovered.

For the reasons we have given, we are of opinion that the court below erred in overruling the demurrer and in entering judgment for the appellee. The plea was bad, and the judgment must therefore be reversed, and a new trial will be awarded.

PLEA IN ABATEMENT—PENDENCY OF TWO SUITS.—As to when a plea of abatement alleging the pendency of a former action is proper, see *Smith v. Lathrop*, 44 Pa. St. 326; 84 Am. Dec. 448, and note 452-457; *Beyersdorf v. Sump*, 39 Minn. 495; 12 Am. St. Rep. 678. A plea of abatement on the ground of the pendency of a former action must show that another action was pending between the same parties, involving the same cause of action, at the time the proceeding sought to be abated was commenced: *American etc. Co. v. Clark*, 123 Ind. 230. The pendency of another action as a matter

of defense must be pleaded, otherwise it will be considered waived: *Montague v. Brown*, 104 N. C. 161.

CONCURRENT NEGLIGENCE OF TWO OR MORE PERSONS, RESULTING IN AN INJURY TO A THIRD PERSON, rights and liabilities of the parties: *Village of Carterville v. Cook*, 129 Ill. 152; 16 Am. St. Rep. 248, and particularly note 250-257; *Gulf etc. R'y Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755. Parties who co-operate in committing a negligent act from which an injury results may be sued either jointly or severally for the damages thereby occasioned: *Andrews v. Boedecker*, 126 Ill. 605; 9 Am. St. Rep. 649, and note; *Flaherty v. Minneapolis etc. R'y Co.*, 39 Minn. 328; 12 Am. St. Rep. 654. Separate suits may be brought against several defendants for joint trespass: *Seither v. Philadelphia Traction Co.*, 125 Pa. St. 397; 11 Am. St. Rep. 905; *Bloss v. Plymale*, 3 W. Va. 393; 100 Am. Dec. 752.

ASH v. BALTIMORE AND OHIO RAILROAD COMPANY.

[72 MARYLAND, 144.]

CONFLICT OF LAWS. — A CAUSE OF ACTION CREATED BY THE STATUTES OF ONE STATE will not support an action in another. Such statutes will be enforced only by the courts of the state wherein they were enacted.

CONFLICT OF LAWS. — AN ADMINISTRATOR HAS NO RIGHTS OR POWERS NOT GIVEN OR IMPOSED by the laws of the state in which he is appointed, and therefore cannot, in such state, sustain an action for the death of his intestate, where his right to do so is founded solely on the statute of another state, and the statutes of his own state would not have sustained the recovery had the facts constituting the cause of action occurred therein.

Albert Constable, for the appellant.

W. Irvine Cross, John S. Wirt, and John K. Cowen, for the appellee.

ALVEY, C. J. This action was brought by the plaintiff, the present appellant, as administratrix of Cecil F. Weaver, deceased, against the defendant company, to recover damages for the alleged killing of the intestate by means of the negligent and improper structure of one of the bridges on the road of the defendant in the state of West Virginia.

Weaver, the deceased, was a citizen of Maryland, and at the time of his death, in June, 1888, was employed as a postal clerk in the service of the post-office department of the United States. His route, by the defendant's railroad, was between Baltimore, in Maryland, and Grafton, in West Virginia. At the time of the accident the train was bound east from Grafton, and it is supposed, though there was no witness to the fact, that the deceased, while performing his duty

in taking in a mail-pouch, hanging from a crane, came to his death by having the back of his head brought violently in contact with one of the timbers of the railroad bridge over Great Cacapon Creek, in West Virginia. Death was instantly produced; but whether from the negligent act of the deceased, or solely from the negligent and improper structure of the bridge, was a question of fact, which, upon the evidence, it is unnecessary for us to express any opinion.

The action is not founded upon the statute of this state which gives the right of action whenever the death of a person shall be caused by the wrongful act, neglect, or default of another for the benefit of the wife, husband, parent, or child of the person whose death shall have been so caused to be brought in the name of the state for the use of the persons so entitled: Code art. 67; but it is founded on the statute of West Virginia, which in many respects is essentially different from the provisions of our statute. The West Virginia statute is set out in the declaration, and it was read in evidence, and is inserted in the bill of exception. That statute, after providing that damages may be recovered for the death of any person caused by the wrongful act, neglect, or default of another, proceeds to provide that "every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties, and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. And in every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars; and the amount so recovered shall not be subject to any debts or liabilities of the deceased; provided that every such action shall be commenced within two years after the death of such deceased person." By our statute, the limitation to the right of action is confined to one year; and there is no restriction as to the amount of recovery.

At the close of the evidence introduced on the part of the plaintiff, the defendant offered a prayer for instruction to the jury that there was no evidence legally sufficient to entitle the plaintiff to recover, and that prayer was granted. And whether that instruction was right or wrong is the only question presented on this appeal.

The plaintiff was bound to show, both by pleadings and proof, that she had a right, upon the law and the facts, to maintain the action; and as this is a special action founded exclu-

sively upon the statute of a neighboring state, the only principle upon which it can be sustained in the courts of this state is that of comity; and if it be not sustainable upon that ground, there was clearly no error committed by the court below in withdrawing the case from the jury.

There is no pretense that this action is maintainable at the common law, or upon common-law principles. It is a special action given by a statute which has no inherent authority or binding force beyond the limits of the state which enacted it. We suppose it to be quite clear that if instead of founding this action upon the statute of West Virginia it had been instituted and attempted to be maintained upon and by virtue of the statute of this state, to the provisions of which we have referred (the statutes of the two states being essentially dissimilar in their provisions), the action could not have been sustained, unless we were to attempt to give extraterritorial force to our statute, and to make it apply to acts and transactions occurring in other states. And if our statute cannot be so extended and applied, there can be no reason why statutes of other states, not similar in provisions to our own, though belonging to the same general class of legislation, should be allowed extraterritorial force and operation by the courts of this state. By the statute of West Virginia the right of action accrues to the personal representative of the deceased, the executor or administrator, and the damages, limited in amount, and hence in the nature of a penalty, are directed "to be distributed to the parties, and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate," whether such parties be wife or children or collateral relations of the deceased. Whereas, by our statute, the right of action is given directly to the parties who suffer damage by the death of the deceased, namely, the wife, husband, parent, or child, and which action is to be prosecuted in the name of the state for the use of the persons entitled, and the jury are required to apportion the damages assessed.

An administrator or executor appointed in this state receives his power and authority to sue and maintain actions from the laws of this state, and from this state alone. It is according to the laws of this state that he must conduct his administration and make distribution. There is no statute of this state, nor any principle of law known to our courts, whereby an administrator or executor is given the right to sue and recover in an action like the present, nor is there any law of distribu-

tion in force in this state that entitles the next of kin or distributees of a decedent's estate to receive the money recovered in an action like the present. And if the present administratrix were allowed to maintain the action it would be exclusively by virtue of a foreign law, and it would only be by force of that law that she could be compelled to account for and make distribution of the money recovered. There is certainly no comity that requires one state to apply and administer the statute law of another in a case such as the present.

In Rorer on Interstate Law, 144, 145, upon review of the authorities, the author states his conclusion to be, that in all purely personal actions of a transitory nature for torts at common law, a citizen of a state may sue a citizen of another state in the courts of such other state, or of any state wherein he may reside or may be found and served with process, without regard to the place or state in which the injury may have been inflicted; but that where certain acts are made wrongs by statute, which were not such theretofore, or where remedies additional to those which existed at common law are provided by statute, advantage can be taken of these new and additional remedies only within the territory or locality in which the statute has force. These constitute new rights, so to speak, and depend for their enforcement always upon the statutes by which they are created. And such statutes will be enforced only by the courts of the state wherein they are enacted. In support of these propositions many well-considered cases may be cited; as those of *Woodard v. Michigan etc. R. R. Co.*, 10 Ohio St. 121; *Richardson v. New York Central R. R. Co.*, 98 Mass. 85; *Taylor's Adm'r v. Pennsylvania Company*, 78 Ky. 348; 39 Am. Rep. 244; *McCarthy v. Chicago etc. R. R. Co.*, 18 Kan. 46; 26 Am. Rep. 742; *Willis v. Missouri Pacific Railroad Co.*, 61 Tex. 432; 48 Am. Rep. 301; *Buckles v. Ellers*, 72 Ind. 220; 37 Am. Rep. 156.

In the case of *Taylor's Adm'r v. Penn. Co.*, 78 Ky. 348, 39 Am. Rep. 244, just referred to, where it was held that an administrator appointed and suing in Kentucky could not maintain an action for the death of his intestate, by negligence, in Indiana, such action being maintainable by an administrator under the Indiana statute, but not under that of Kentucky, the court of appeals of the latter state said: "A personal representative, as such, has no rights or powers beyond the jurisdiction of the government under whose laws he received his appointment, and therefore he cannot have any rights nor be subject

to any obligations or duties not imposed by the law of his official domicile. He cannot carry his official character abroad, nor can his official powers and duties at home be affected by foreign laws. A Kentucky administrator suing in a Kentucky court must be able to show that the laws of Kentucky entitle him to the thing sued for. He cannot receive his office from one jurisdiction, and appeal to the laws of another jurisdiction for rights or powers not given by the law which created him." And the same principle is fully sustained, in a well-reasoned opinion by the supreme court of Ohio, in *Woodard v. Michigan etc. R. R. Co.*, 10 Ohio St. 121.

We are aware that there is some diversity of opinion upon this subject; but we are not aware that there is any well-considered case that holds that the action may be maintained in a state other than that in which the accident occurred, on the same state of facts as here presented, and where there existed in the statutes of the two states upon this subject such dissimilarity of provisions as we find to exist in the statutes of West Virginia and Maryland.

In *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491, it was held that an administrator appointed in the state of New York might maintain an action for the death of his intestate, occasioned by a negligent injury inflicted by the defendant in another state having a statute substantially like the New York statute allowing an action of damages for death by negligence to be prosecuted by the personal representative of the deceased. And in the case of *Dennick v. Central R. R. Co.*, 103 U. S. 11, brought up from a circuit court sitting in New York, the same rule of decision is maintained as that laid down in *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; 38 Am. Rep. 491. This case in 103 United States, 11, is much relied on by the plaintiff; but the facts of that case are not similar to the facts of the present case. In that case the death occurred in New Jersey, and the action was brought by an administratrix appointed in New York; and in delivering the opinion the supreme court said "that a statute of New York just like the New Jersey law provides for bringing the action by the personal representative, and for distribution to the same parties, and that an administrator appointed under the law of that state would be held to have recovered to the same uses and subject to the remedies in his fiduciary character which both statutes prescribe." The court also said "that the questions growing out of these statutes are

new, and many of them unsettled. Each state court will construe its own statute on the subject, and differences are to be expected." It is clear, therefore, that the decision in the case reported in 103 United States does not apply to this case.

But even the qualified decisions of the court of appeals of New York and of the supreme court of the United States upon this subject have not met with general approval, and have not been generally followed by subsequent state court decisions.

In the recent case of *Davis v. New York etc. R. R. Co.*, 143 Mass. 301, 58 Am. Rep. 138, it was held by the supreme court of Massachusetts that an action by an administrator could not be maintained in that state for the death of a person, caused by the negligence of the defendant in another state, the remedies provided in the two states not being alike. And the court expressly declined to depart from its own previous decision in *Richardson v. New York Cent. R. R. Co.*, 98 Mass. 85, and follow the general doctrine laid down in *Dennick v. Central R. R. Co.*, 103 U. S. 11.

And so in the case of *Vawter v. Missouri Pacific R'y Co.*, 84 Mo. 679, 54 Am. Rep. 105, where it was held by the supreme court of Missouri that an administrator appointed in that state could not maintain an action there for the death of his intestate by negligence of the defendant in Kansas, such action being allowed by the statute of Kansas, but not by that of Missouri. There, also, the case of *Dennick v. Central R. R. Co.*, 103 U. S. 11, and *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491, were pressed upon the court for the general doctrine there laid down; but the supreme court of Missouri declined to adopt or follow those cases, and decided in accordance with what was taken to be the well-established general principle of interstate law in such cases. And even in New York, in the recent case of *Debevoise v. New York etc. R. R. Co.*, 98 N. Y. 377, it was held that an action by an administrator for damages for the death of his intestate, caused by the negligence of the defendant in another state, could not be maintained in the courts of New York, without proof of the existence of a like statute to that of New York in the state where the accident occurred,—thus showing that the right of action given by statute for the death of an individual is not transitory, like the common-law right of action for personal injuries, but the operation and force of such statute must be confined to the state enacting it, except where it

can be extended by comity. And whether an action would be sustained by the courts of this state for the death of a person occurring in another state having a statute of the same or like provisions as our own, is a question not presented in this case, and in regard to which we express no opinion.

The plaintiff having entirely failed to show any such state of case or cause of action as would entitle her to recover in a Maryland court, there was no error in taking the case from the jury, and therefore the judgment must be affirmed.

CONFLICT OF LAWS. — As to actions in one state to enforce a cause of action created by the statute of another state, see note to *Attrill v. Huntington*, 14 Am. St. Rep. 350-355, wherein is discussed actions for wrongful acts causing death in another state. Compare *Laird v. Railroad*, 62 N. H. 254; 13 Am. St. Rep. 564; *Bridger v. Asheville etc. R. R. Co.*, 27 S. C. 456; 13 Am. St. Rep. 653, and note.

In *Bruce v. Cincinnati R. R. Co.*, 83 Ky. 174, it is decided that an action to recover damages for death may be brought in Kentucky, even though the cause of action arose in another state, where both states give a right of action in such cases.

MARBURY v. EHLEN.

[72 MARYLAND, 206.]

NOTICE OF WILL AND TRUST. — Where stocks of a corporation stand on its books in the name of a decedent, and a transfer thereof is made by his executors to another person as trustee, the corporation is thereby notified of the existence of the will, and required, before proceeding further, to inform itself of the terms of the will and of the trust upon which the executors were authorized to transfer the stock to the trustee, and is liable if it permits the latter to transfer the stock under circumstances inconsistent with his trust.

CORPORATION MUST SEE THAT NO UNAUTHORIZED TRANSFERS OF ITS STOCK ARE MADE, and is liable to any one injured by a breach or neglect of this duty.

TRUSTS, NOTICE OF. — The addition of the word "trustee" to the name of a person is notice of a trust, and calls for inquiry and examination.

TRUSTEE IS PRESUMED TO HOLD PROPERTY FOR ADMINISTRATION, AND NOT FOR SALE.

CORPORATION IS LIABLE FOR THE TRANSFER OF STOCKS which stand on its books in the name of one as trustee, unless he was authorized to make such transfer, because a trustee is not presumed to have the right to sell or transfer, and the corporation is affected with notice that he has probably violated his trust in attempting to transfer the trust property without producing any authority for so doing.

NOTICE NOT LOST BY LAPSE OF TIME. — If stock of a corporation stands on its books in the name of a testator, and his executors transfer it to another person, designated as trustee, the corporation is thereby informed of a will, and given notice of its contents and of the terms of any trust

thereby created, and though the stock continues to stand in the name of such trustee for fourteen years, the corporation will be deemed to have continuing knowledge of the will and trust, and will be liable for permitting a transfer by the trustee in contravention of the trust.

TRANSFERS IN CONTRAVENTION OF TRUST RATIFIED BY SOME OF THE BENEFICIARIES. — IF A PORTION OF TRUST PROPERTY IS TRANSFERRED in contravention of the trust under which it was to be held for the benefit of the trustee's children which he should have at any time during his life, and all the beneficiaries in being, except one, ratify the transfer, the whole of the trust property so transferred may be recovered for the purpose of holding it under the trust until the death of the original trustee, before which time it will be impossible to ascertain all the beneficiaries who may become entitled thereto, and when that event arrives, the persons to whom the transfers were made will be subrogated to the interests of all the beneficiaries who ratified such transfers, and will not be compelled to permit those who have not ratified, to elect to take their share wholly out of the portion improperly transferred.

William L. Marbury and Alexander H. Robertson, for the appellant.

William Pinkney Whyte, attorney-general, and Bernard Carter, for the appellees.

IRVING, J. By the decision of this court in *Ehlen v. Ehlen*, 63 Md. 273, it was adjudged that by the will of John H. Ehlen, dated the 18th of November, 1850, a trust was created for the one-eighth part of the testator's estate in the hands of John F. Ehlen as trustee, to continue during his life, for the benefit of such children as he then had or might thereafter have. It was also decided in that case that John F. Ehlen had committed a breach of trust in disposing of the trust property, and converting the same to his own use, and the decree of the lower court removing him from his trusteeship and appointing the present appellant trustee in his stead was approved and affirmed.

By bill in equity, the appellant (the present trustee) seeks to recover from Frank Ehlen, the Baltimore Fire Insurance Company, and the mayor and city council of Baltimore certain stocks of the fire insurance company and of the city of Baltimore alleged to have been transferred to Frank Ehlen by his father, John F. Ehlen, in breach of his trust, and which transfers were perfected on the books of the insurance company and of the mayor and city council under circumstances which, the bill alleges, affected them with knowledge of the breach of trust, and consequently made them answerable for having aided in it.

It appears, by the record of the case in 63 Maryland, which

by agreement is made a part of this record, that by decree of the circuit court of Baltimore City there was a partition of the property of John H. Ehlen among the parties entitled, and that one eighth thereof was awarded to John F. Ehlen, trustee under the will, for his children then living or thereafter to be born to him, and that the share allotted to John F. Ehlen as such trustee amounted to \$15,700.23, and that by a sale of some property afterwards ordered by the court to be sold for partition this one-eighth share of the testator's estate was swelled to considerably over \$16,000. Very much the larger part of the share thus allotted to John F. Ehlen, trustee, consisted of Baltimore City stocks, railroad stocks, and stocks in fire insurance companies which stood in the name of the testator. The bill in this cause charges that among the stocks thus assigned to John F. Ehlen as trustee was \$2,500 of Baltimore City stock of 1890, appraised at \$112, making the sum of \$2,800, and 52 shares of the stock of the Baltimore Fire Insurance Company, appraised at \$27 per share, making the sum of \$1,404. This Baltimore City stock so awarded to John F. Ehlen, trustee under his father's will (by decree of the circuit court of Baltimore City on the 8th of March, 1878), the bill charges was transferred, between the 8th of March, 1878, and the 8th of April, 1878, by John F. Ehlen and Benjamin F. Newcomer, executors of John H. Ehlen, to John F. Ehlen, trustee under the will of John H. Ehlen, on the books of the register's office of Baltimore City; and that on the eighth day of April, 1878, the same stock was transferred on the city's books to Frank Ehlen, a son of John F. Ehlen, by John F. Ehlen, trustee; and that this transfer was made without the order of the court and without the sanction of the will of John H. Ehlen; and that the mayor and city council well knew that the trustee had no authority to make the transfer, and that the same was without lawful authority.

The fifty-two shares of stock of the Baltimore Fire Insurance Company which were awarded in the partition to John F. Ehlen, trustee under his father's will, the bill charges that the executors of John H. Ehlen transferred on the books of the company to John F. Ehlen, trustee, and that he afterwards transferred the same on the books of the company to Frank Ehlen, son of the trustee, John F. Ehlen; and the bill charges that the Baltimore Fire Insurance Company well knew that there was no order of court authorizing such transfer to Frank Ehlen, and that the same was without lawful authority.

The bill charges John F. Ehlen to be insolvent, and prays that Frank Ehlen and the mayor and city council may be required to make good the two thousand five hundred dollars of city stock transferred as hereinbefore stated to Frank Ehlen without lawful authority, and that Frank Ehlen and the Baltimore Fire Insurance Company may be required to make good the fifty-two shares of that company's stock illegally assigned to Frank Ehlen.

In their answer the fire insurance company admits that on the 18th of July, 1878, fifty-two shares of the capital stock of the company stood in the name of John F. Ehlen and Benjamin F. Newcomer, trustees, and on that day the certificate was surrendered with an indorsement for its transfer to John F. Ehlen, trustee, but without any declaration of the trust or designation of the character of trust under which the stock was to be held, and that a new certificate therefor was issued, and that on the 22d of January, 1879, the same stock was transferred to Frank Ehlen by John F. Ehlen, trustee. The company denies that it had any knowledge of the transfer being made without legal sanction or in violation of the terms of John H. Ehlen's will, and further claims in the answer that there was not anything to show or put it upon inquiry that the trustee, John F. Ehlen, did not have authority to make the transfer. It denies that so far as the insurance company respondent is concerned the transfer was made in fraud of the *cestuis que trust*.

The mayor and city council by their answer admit that the executors of John H. Ehlen were, on the 5th of April, 1878, holders of the city stock mentioned in the bill, which was transferred on their books on that day to John F. Ehlen, trustee, and that on the 8th of April, 1878, the same was transferred on their books to Frank Ehlen; but they deny that they had any knowledge of the will or its trusts, or anything to put them on inquiry about the same, and deny that they are in any way liable to make good the misapplication of the trust property by John F. Ehlen, the trustee. The Baltimore Fire Insurance Company and the mayor and city council of Baltimore defend separately, but the counsel for each of those respondents relies upon the decision of this court in *Albert v. Savings Bank*, 2 Md. 159, as fully establishing that there was nothing in this case to put them upon inquiry, contending that the facts of that case are precisely analogous to this, and that decision must control the decision in this case. No other

authority has been cited to sustain their view of non-liability, and after careful search we think no other can be found, in or out of the state, tending to sustain their contention.

So far as the mayor and city council are concerned, we think their case bears little resemblance to the case of Albert, in 2 Maryland. It is, however, exactly analogous, in its facts, to the case of *Stewart v. Fireman's Ins. Co.*, 53 Md. 565, where the fire insurance company was held liable for the unauthorized transfer of stock by a trustee on the books of the company. In that case there was a will by which certain stocks in the fire insurance company passed, under a residuary clause of the will, to trustees, in trust for testator's grandson for life, with contingent limitations over. The trustees, with the approval of the insurance company, transferred portions of these stocks, and converted them to their own use, in breach of their trust. They were removed, and Duffy and Stewart were appointed trustees in their stead, and sued the Fireman's Insurance Company, with others, for the stock improperly assigned and converted by the trustees, who were removed for their breaches of trust. Precisely the same defense was set up there as is set up here, and Albert's case, in 2 Maryland, was also relied on; but the court very properly distinguished it from Albert's case, and held the company negligent in allowing the transfers and perfecting them, when it had enough to put it on inquiry as to the nature of the trust and failed to make such inquiry, and consequently liable. In that case the stock stood on the books of the company in the name of the original owner until the transfers were made by the executors; and the court notes the difference between that case, in that regard, and Albert's case, where the stock never did stand on the books in the name of the testator, but were purchased by the executors after the death of the testator.

In Stewart's case, 53 Md. 575, the court says: "The fact that Simms and Tyson, in making these transfers, professed to act as executors of Johnson, the deceased stockholder, gave the company or its officers, to whom superintendence of transfers was committed, actual notice that Johnson left a will which was open to inspection upon the public records, and made the company chargeable to the same extent as if such officers had actually read it, and thereby made themselves acquainted with its contents. The company, therefore, must be dealt with as if it had actual knowledge of the provisions of that will at the time the first transfer was proposed to be

made. This proposition was expressly decided by Chief Justice Taney in the case of *Lowry v. Commercial and Farmers' Bank*, Taney, 310." This decision by Judge Taney has been adopted throughout the country now as the law, and is the leading case on the subject. Applying its principles and the reasoning of the court in the case of *Stewart*, we cannot see how the mayor and city council can escape liability in this case. The stock in this case was the stock of the testator, and stood on the city's books in the testator's name when he died. It is admitted in the answer that the executors of the testator made the assignment of the stock to John F. Ehlen, as trustee, on the fifth day of April, 1878, and that three days afterwards John F. Ehlen, trustee, transferred the same stock of Frank Ehlen. Now, according to the doctrine of *Lowry v. Commercial and Farmers' Bank*, Taney, 310, so unequivocally adopted and pronounced in *Stewart v. Fireman's Ins. Co.*, 53 Md. 575, 576, the city's officers were notified of a will of which John F. Ehlen and Benjamin F. Newcomer were the executors, and by referring to the same, which was of record, they would have learned by what authority and for what purpose the assignment was made to John F. Ehlen as trustee, and would have learned that he could not assign that stock as he did, without an order of court, without committing a breach of trust; and if they failed to make the proper inquiry and examination, it was their own fault, and they must bear the consequences of their negligence, and must be treated as having full knowledge of all the circumstances of the case. It is true, the last assignment was only subscribed "John F. Ehlen, trustee," and it is contended that was not, of itself, under Albert's case, sufficient to put the city on notice. The effect of the simple addition of "trustee" to the signature of assignor will be considered hereafter in this opinion, but for the purposes of the case against the mayor and city council, it is unnecessary to consider it. The assignment by the executors to John F. Ehlen, trustee, and by him to Frank, were so nearly contemporaneous that it would be most unreasonable to hold that the city was not affected with knowledge of the source of John F. Ehlen's title as trustee, which the city's officers had only approved three days before. So far as the case against the city is concerned, we are unable to distinguish it, in any particular, from the case of *Stewart*, and think that case fully establishes the city's liability.

There is more plausibility and force in the contention

made on the behalf of the Baltimore Fire Insurance Company that their case falls within the ruling in Albert's case, in 2 Maryland; but a careful consideration and examination of the facts reveal such differences between Albert's case and this, that we cannot deny the liability of the fire insurance company on the strength of that case. In that case the stock involved never stood on the books of the company as the property of the testator in his lifetime. Here it was the testator's property, and stood in his name, at his death, on the books of the company. When the transfer made by the executors in Albert's case was made, the assignment by the executor might be presumed to be rightful by reason of his general power over the estate, for the act of 1843, chapter 304, had not been passed. That act declared that no title should pass where the executor disposed of property without an order of the orphans' court first had and obtained. Section 274 of article 93 of the code of 1860 makes that provision, and was the law when the transfers here involved were made; and the law still is, under section 276 of article 93 of the present code, that such sale, without the previous order of the orphans' court, is void. Judge Taney, in Lowry's case, already cited, which grew out of the same will as did Albert's case, adverts to the fact that the act of 1843, chapter 304, had not then been passed, so as to make the act of the executor subject to suspicion and question. If the authority of Albert's case is to be regarded as still binding, and unshaken by subsequent decisions in the state, still we think the distinctions we have noticed are sufficient to withdraw this case from its control. The modern doctrine in respect to what constitutes notice in such cases, and that which obtains everywhere, is so much broader in its reach than that which is found in Albert's case, that to keep in harmony with the decisions and law as received elsewhere, we do not think the case of Albert, in 2 Maryland, should be followed in any case which is not precisely analogous in all its facts.

As this court has approved the case of *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, in *Third National Bank of Baltimore v. Lange*, 51 Md. 144, 34 Am. Rep. 304, and again in *Swift v. Williams*, 68 Md. 255, 256, where the court followed *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, and held that the addition of the word "trustee" was notice of a trust, which called for inquiry and

examination, it is very certain that Albert's case cannot be followed except in a case exactly analogous in its facts.

In the case of *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, it was stock which was sold by the trustee, with the addition of the word "trustee" to his signature to the transfer. In Lowry's case, Judge Taney says the corporation is the custodian of the stock, and clothed with powers to protect all persons interested from unauthorized transfers; and that it is the duty of the corporation to exercise diligence in the discharge of its trust, to see that unauthorized transfers are not made to the prejudice of *cestuis que trust*. This doctrine so fully obtains that Cook on Stock and Stockholders, section 399, lays it down as text-book law that if the corporation neglects its duty in this regard, it becomes liable for the breach of trust which may be committed.

A trustee presumptively holds trust property for administration, and not for sale: *Jaudon v. National City Bank*, 8 Blatch. 430. In *Duncan v. Jaudon*, 15 Wall. 165, in affirming this decision of Judge Blatchford, the supreme court says the party taking such stock in pledge deals with it at his peril, for there is no presumption of a right to sell it. There being no presumption of the right to sell, a corporation ought to be held affected with notice that a trustee is probably violating his trust when he attempts to sell trust property known to the corporation to be such, without the production of authority for making the transfer.

In the case of the Baltimore Fire Insurance Company it is admitted by agreement made part of the record that on the 11th of January, 1865, there were 416 shares of the stock of the company standing in the name of John H. Ehlen; and that on that day the executors of John H. Ehlen transferred them on the books of the company to themselves as trustees. On the 20th of July, 1878, fifty-two of these shares were transferred by the executors, John F. Ehlen and Benjamin F. Newcomer, to John F. Ehlen, trustee; and on the 22d of the succeeding January, 1879, fifty-two shares were transferred by John F. Ehlen, trustee, to his son Frank Ehlen. Others of the 416 shares were transferred to other parties; but in this case we have only to do with the fifty-two shares thus transferred to Frank Ehlen.

In this state of facts the fire insurance company contends there was nothing disclosed which gave the company notice of the character of the trust, and there was nothing putting upon

inquiry so as to affect the company with constructive notice. Counsel relied on the length of time which had elapsed from the change on the books from the testator's name to the executors as trustees, and from them as trustees to John F. Ehlen as trustee, and insisted that there was no source of information indicated but the trustee, and if they had applied to him, they probably would have received answer that the stocks were really his. This view cannot be tenable. The history of the transaction was before the company on its books. It had notice by its books that the stock was originally the property of a person who had made a will, for executors made a transfer of the stock to themselves as trustees. By what authority that was done according to Lowry's case and Stewart's case, the company was bound to have understood before allowing the transfer. Being once informed of the will and its provisions affecting that stock, that knowledge continued all the way down, and the company was bound to see that the trust property in their custody was protected and was not misappropriated. Having failed to do its duty, and allowed the stock to be improperly assigned away and wasted, which could not have been done without the company's co-operation, the company is bound to make good the loss.

The remaining question in the case is to what extent the plaintiff shall be allowed to recover. All the *cestuis que trust*, except one infant, Blanche Ehlen, have assigned their interests to their father, ratifying his acts as trustee; and the appellees insist that in no event can recovery be had except to the extent of Blanche Ehlen's interest, which they say is only one fifth of the stock misapplied, on the ground that the release of John F. Ehlen inures to them. To a certain extent this is true; but the full effect of that release and assignment is not yet known, and the relief as to it cannot yet be accorded to the appellees. The trust, by the will, was constituted for the benefit of the children of John F. Ehlen now living or that may hereafter be born. There is no restriction to the children of any particular wife. He is still living, and we cannot assume other children may not come into being who shall be entitled to share in the fund. Until John F. Ehlen's death the fund must remain undivided, but on his death the respondents would be entitled to have restored to them such shares thereof as would not belong to Blanche Ehlen or other children that may possibly become participants in the trust, but who are not now in being. The appellees will be entitled

ultimately to be subrogated to the shares of those who have released. Until such time as division of the fund may be had, it must remain as an entirety, and then division must be made in strict conformity to the will. The theory of the appellant, that the infant Blanche must, in the division, be allowed her share of the whole trust estate out of this portion of it, cannot be assented to. That would be making these appellees bear the consequences of breaches of trust in which they had no participation, and is too grossly inequitable to be thought of.

For the reasons we have assigned, the decree dismissing the appellant's bill will be reversed, and the cause will be remanded to the end that a decree may be passed in conformity with the views we have expressed in this opinion; that is to say, that a decree may be passed directing the mayor and city council of Baltimore and the Baltimore Fire Insurance Company to pay the respective sums due the trust from them by reason of the transfers of stock to which they have respectively assented; and that the same may be held by the plaintiff as trustee during the life of John F. Ehlen, and at his death for division according to the principles we have expressed.

CORPORATIONS — TRANSFERS OF STOCK. — The corporation is responsible for unauthorized transfers of corporate stock: *Taft v. Presidio R. R. Co.*, 84 Cal. 131; 18 Am. St. Rep. 166. A transfer upon the corporation's books of stock, in the absence of the original certificate, is made by the corporation at its own peril: *Supply Ditch Co. v. Elliott*, 10 Col. 327; 3 Am. St. Rep. 586.

CORPORATIONS — CERTIFICATES IN THE NAME OF A "TRUSTEE." — The word "trustee," appearing in certificates of corporate stock, puts persons upon inquiry: *Fisher v. Brown*, 104 Mass. 259; *Loring v. Salisbury*, 125 Mass. 138.

SHUPP v. HOFFMAN, EAVEY & Co.

[72 MARYLAND, 359.]

NO ANSWER TO A SCIRE FACIAS WILL BE SUSTAINED, if it states matters which would have constituted a defense to the original action.

JUDGMENT AGAINST A MARRIED WOMAN IS NOT VOID, and therefore, to a *scire facias* based upon an unconditional judgment, it is not sufficient to plead that the defendant, at the time of its recovery, and of the execution of the obligation on which it was founded, was a married woman.

Frederick F. McComas, for the appellant.

J. Clarence Lane and Henry H. Keedy, for the appellees.

BRISCOE, J. The appellant in this case, Catharine A. Shupp, executed a promissory note on the twenty-fifth day of June, 1877, to the appellees for the sum of \$350; and on the twenty-seventh day of June of the same year a judgment by confession for the amount of the debt and interest was entered, according to the written assent and agreement of the plaintiffs and defendant. There was no effort made to enforce the payment of this judgment until the twenty-fourth day of September, 1888, more than eleven years after its rendition, when a *scire facias* was issued by order of the plaintiffs. To the *scire facias* the defendant pleaded her coverture; that at the time of the execution of the obligation and of the recovery of the judgment she was a married woman; and that her husband was not joined in the suit.

The appellees then filed three replications, alleging, — 1. That although being a married woman at the time of the execution of the note upon which judgment was rendered, she was living apart from her husband, under articles of separation; 2. That the debt for which said note was given was contracted by her in and about her own business and trade, in which she was engaged apart from her husband; and 3. That she was engaged in business dealings with the plaintiffs on her own behalf, as a *feme sole* trader, and that the said note in this case was part of said dealings. The defendant demurred. The court sustained the demurrer to the first replication, and overruled it as to the second and third.

There were four prayers offered at the trial; the first, asking the court to instruct the jury that the plaintiffs are not entitled to recover against the defendant as a married woman, nor to have the judgment *fiat*, was rejected. The defendant excepted to the rejection of this prayer; and the verdict being for the plaintiffs, the defendant appealed.

This case being before the court upon demurrer, the only question presented on the appeal necessary for us to consider is, whether it was competent, under the pleadings, for the appellant to interpose the plea of coverture to the writ of *scire facias* issued on an absolute unconditional judgment.

The law is well settled that in answer to a *scire facias* the defendant cannot set up any matter which might have been relied on as a defense to the original action; otherwise there would be no end to litigation: *Downey v. Forrester*, 35 Md. 118; *Foster on Scire Facias* (L. L.), 353.

The *scire facias* in this case sets forth an unconditional

judgment, and there is nothing upon the face of the original proceedings, or the writ itself, which discloses the fact of coverture. To allow similar pleas would destroy the certainty and finality with which judgments are now accepted in this state.

It was held in the case of *Conlyn v. Parker*, 113 Pa. St. 29, that the plea of coverture to a *scire facias* to revive and continue the lien of a judgment entered on the warrant of attorney in the bond of a married woman is not a denial of the existence of the judgment on which the *scire facias* issued, nor an averment of the satisfaction or the discharge thereof; that it is an inappropriate plea, and insufficient to prevent the entry of judgment, and it is not error for the court to strike it off. There was nothing on the record in that case, either of the original or of the revived judgment, to show the coverture of the defendant.

The case of *Griffith v. Clarke*, 18 Md. 457, relied on by the appellant, has no application to this case under its present pleadings. That case was on motion to dissolve an injunction granted in equity to restrain an execution issued on a judgment which had been rendered upon a joint note of husband and wife. The judgment in that case was rendered in 1858. Since that decision, however, there have been many changes by acts of assembly in this state in reference to the rights and liabilities of married women, and the law has been materially modified by this legislation since that case: *Ahern v. Fink*, 64 Md. 161. In the case at bar, the judgment is valid on its face, it not appearing in the record that the defendant was a married woman, the presumption being that the cause of action was founded upon a contract which she was competent to make, under the recent legislation in this state. The demurrer filed in this case brings the entire pleadings under review, and as the plea of coverture was insufficient in law, the demurrer mounts to the first error in pleading, and it follows that the judgment should have been entered for the plaintiffs upon demurrer, it being the established rule, upon a demurrer, that the court, notwithstanding there may be a defect in the pleading demurred to, will give judgment against the party whose pleading is first defective in substance: *Osceola etc. Tribe v. Schmidt*, 57 Md. 98.

We do not by this decision mean to embrace a case where the original judgment was null and void, though the judgment in this case would not necessarily be void, even supposing the

defendant was a married woman, because under our statutes, under some circumstances, judgments against married women are valid and binding: *Loweckamp v. Koechling*, 64 Md. 95. The liability in this case occurring since the recent provisions of the law upon the subject, the presumption is, that said judgment is valid, nothing appearing upon the original judgment or the revived judgment showing her coverture.

The judgment, for these reasons, will be affirmed.

SCIRE FACIAS — DEFENSES. — As to what defenses may and what may not be made to a *scire facias*, see note to *Frierson v. Harris*, 94 Am. Dec. 238-242.

MARRIED WOMEN, JUDGMENTS AGAINST. — The general rule is, that married women are within the jurisdiction of the courts, and judgments against them are valid: Note to *White v. Lumber Co.*, 6 Am. St. Rep. 653; *Parsons v. Spencer*, 83 Ky. 305.

AMERICAN DISTRICT TELEGRAPH CO. v. WALKER.

[72 MARYLAND, 454.]

LIABILITY, LIMITATION OF. — Where a corporation engaged in the business of furnishing messenger-boys to perform various services was in the habit of limiting the extent of the damages to which it might become answerable in the course of its services, and the condition prescribing such limitation was printed at the foot of its blank delivery tags, it was held that evidence of the limitation was rightfully excluded, where there was no evidence of any contract, by tags or otherwise, containing any limitation of liability.

AN AGREEMENT TO CARRY OR DELIVER PROPERTY FOR A REWARD, made by one who is not a common carrier, creates the duty to exercise reasonable care, but does not impose a liability on him for losses not occasioned by the ordinary negligence of himself or his servants.

MESSANGER-BOY, NEGLIGENCE OF. — If a corporation, engaged in supplying messenger-boys to perform various services, on being asked for a boy competent to drive a pair of horses to a stable, sends a boy to take charge of them, who undertakes to drive them to the stable, but through his negligence or want of skill they run away, causing damage to themselves and the vehicle to which they were attached, the corporation is answerable for the damages thus occasioned.

BAILEE'S RIGHT TO RECOVER DAMAGES. — The hirer of a vehicle is entitled to recover for injuries thereto resulting from the negligence of another in whose custody the hirer placed it, because the latter is answerable to the general owner.

D. K. Este Fisher, for the appellant.

John V. L. Findlay, for the appellee.

ALVEY, C. J. This action was brought by the appellee against the appellant to recover for injury to a pair of horses,

and to a surrey wagon, a vehicle to which the horses were attached at the time of the accident. The question is, whether the defendant is responsible for the consequences of the accident.

The defendant is a corporation, and it appears that it holds itself out for the undertaking of the performance of various services, such as the carriage of parcels, messages, and other errands and commissions, upon call at district stations in the city. The corporate name of the defendant would not appear to indicate very clearly the nature of the duties that it assumes to perform.

It appears that the plaintiff was the owner of a pair of valuable horses, which he kept at Little's livery-stable, on Howard Street; and having the horses hitched to a surrey wagon hired of the proprietor of the livery-stable, for a drive in the country, upon his return he and his companions stopped at a restaurant on the corner of Calvert and German streets; and desiring to have the horses and vehicle taken to the livery-stable, he went to the nearest district office of the defendant and asked for a boy competent to drive a pair of horses to Little's stable, on Howard Street, and paid the customary charge for a messenger service. The manager of the office responded, and sent a boy to take the team, but on seeing the horses and being asked if he could drive, the boy said he could not drive a double team, and thereupon he was sent back to the office by the plaintiff, and the latter then determined to wait for the driver from the stable; but before such driver arrived, another boy from the defendant's office called to take the team, who said, in answer to an inquiry, that he had driven a double team before; and the plaintiff gave the horses and vehicle in charge of the boy, and gave him direction as to the course he should take to get to the stable in order best to avoid crowded streets. The boy started off with the team, but on the way to the stable, the horses ran off, threw out the boy, broke up the vehicle, and one of the horses was so seriously injured that he had to be shot, and the other horse was rendered unsafe to drive. There was evidence given tending to show that the running away of the horses was caused by the negligent or unskillful driving of the boy. It would appear that the furnishing of boys to drive teams for customers was part of the ordinary business of the defendant; for Little, the keeper of the livery-stable, testified that the defendant had a call-box in his stable, and that he frequently called messenger-

boys of the defendant to drive teams, and they were supplied, and that he settled for such service monthly.

There was evidence offered by the defendant for the purpose of proving previous knowledge on the part of the plaintiff of a limitation as to the extent of damages for which the defendant would contract to be answerable for any injury that might be sustained in the course of its service. Such condition was printed at the foot of its blank delivery tickets. But it was not shown that there was any contract in this case, by ticket or otherwise, containing any such limitation of liability, and the evidence offered was therefore rejected, and we think properly so.

Upon the whole evidence, the court instructed the jury, upon request of the plaintiff, that if they found from the evidence that the defendant undertook, for a reward, to deliver the team of horses and vehicle, as described in the evidence, to a person designated by the plaintiff, and in the course of this undertaking intrusted the driving of the team to one who, by his negligence, permitted the horses to run away, whereby the plaintiff suffered damage, then the plaintiff was entitled to recover, and the jury should allow such damages as they might find, from the evidence, the plaintiff suffered by reason of the defendant's default in the premises.

The defendant offered six prayers, all of which were rejected by the court. He also moved the court to exclude from the jury all the evidence on the part of the plaintiff which related to the injury of the surrey wagon, and the expense incurred in repairing the same. And to the refusal of its prayers, and the motion to exclude the evidence, as well as to the instruction given by the court to the jury, the defendant excepted.

This is a case of bailment for hire; but the defendant did not, by its undertaking, incur the liability of a common carrier. This species of bailment is included in what Lord Holt, in the leading case of *Coggs v. Bernard*, 2 Ld. Raym. 917, classifies as the fifth sort, viz., "a delivery to carry or otherwise manage, for a reward to be paid to the bailee," and as to which, said Lord Holt, the cases are of two sorts, "either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events." But as to the second sort he says "they are bailiffs, factors, and such like," in which case the bailee is only bound to take reasonable care; and "the true reason of the

case is," says the learned judge, "it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it." And so Judge Story, in his work on bailments, section 457, founding his text principally upon Lord Holt's classification, states the same distinction. He says: "Every such private person is bound to ordinary diligence, and to a reasonable exercise of skill; and of course he is not responsible for any losses not occasioned by the ordinary negligence of himself or his servants. He will not, therefore, be liable for any loss by thieves, or for any taking from him or them by force, or where the owner accompanies the goods to take care of them, and is himself guilty of negligence. This is the general rule; and it of course applies to all cases where he has not assumed the character of a common carrier, unless, indeed, he has expressly, by the terms of his contract, taken upon himself any such risk." The application of the principle of this species of bailment, and the extent of the liability of the bailee, are well explained and illustrated by the cases of *Newton v. Pope*, 1 Cow. 109; *Brind v. Dale*, 8 Car. & P. 207; and *Searle v. Laverick*, L. R. 9 Q. B. 122; and those cases show that if negligence or want of skill in the bailee or his servant be the ground of action, the *onus* of proof is on the plaintiff.

The instruction granted by the court is based exclusively upon the alleged negligence of the boy in driving the horses. There was evidence tending to prove such negligence, and we perceive no error in the instruction. The boy was furnished from the defendant's office to take charge of and to drive the team of horses to the livery-stable, and having assumed the duty for a reward, the defendant was bound to furnish a driver both competent and careful.

Nor do we perceive that there was any error committed by the court in refusing to exclude from the consideration of the jury the evidence in regard to the damage done to the surrey wagon, and the expense of its repair. It is true, the plaintiff was not the general owner of the wagon, but having hired the vehicle, he was bailee, and as such he had a special property in it, which entitled him to recover for any injury to it, as against a party without title. He was answerable to the general owner, and was therefore entitled to recover of the defendant to the full extent of the injury to the vehicle caused by the negligent act of the defendant's servant: *Harker v. Dement*, 9 Gill, 7, 13; 52 Am. Dec. 670.

With respect to the prayers offered by the defendant, we think there was no error in rejecting them. The instruction actually given by the court was as favorable to the defendant as any that could well have been given, upon the facts of the case, and which instruction rendered it wholly unnecessary to grant the second and third prayers of the defendant; as by the instruction given the defendant was only held to that degree of care which an ordinary bailee for hire is liable. And as to the other prayers, clearly, in view of what we have said in regard to the nature of the liability of the defendant, there was no error in rejecting them. The judgment must therefore be affirmed.

BAILEE'S RIGHT TO RECOVER DAMAGES. — A bailee may recover damages for any injury to the property bailed, while in his possession: *Little v. Fossell*, 34 Me. 545; 56 Am. Dec. 671. The actual possession of personalty by a bailee thereof will sustain an action by him for an injury thereto: *Laing v. Nelson*, 41 Minn. 521.

CORPORATIONS — LIABILITY FOR NEGLIGENCE OF SERVANT. — The acts of a servant of a corporation are the acts of the corporation, when within the scope of their employment, and their negligence is its negligence: *Hilsdorf v. St. Louis*, 45 Mo. 94; 100 Am. Dec. 352; *Illinois C. R. R. Co. v. Read*, 37 Ill. 484; 87 Am. Dec. 260, and note; *Delta L. Co. v. Williams*, 73 Mich. 87.

MASTER AND SERVANT — SERVANT'S NEGLIGENCE OR INCOMPETENCY. — As to the liability of a master or principal for the negligence of his servant or agent, see note to *Blake v. Ferris*, 55 Am. Dec. 317-321. One agreeing to furnish a man competent to drive a team of horses is responsible for his carelessness or incompetency: *Ames v. Jordan*, 71 Me. 540; 36 Am. Rep. 352.

PHILADELPHIA, WILMINGTON, AND BALTIMORE RAIL-ROAD COMPANY v. ANDERSON.

[72 MARYLAND, 519.]

BURDEN OF PROOF. — OCCURRENCE OF ACCIDENT TO A PASSENGER IS PRIMA FACIE EVIDENCE of negligence on the part of the carrier, throwing upon it the *onus* of rebutting the presumption by proof that there was no negligence. This can only be done by proving facts and circumstances explaining the cause of the accident, showing it to have been such as could not have been guarded against by the utmost care and prudence.

NEGLECT, CONTRIBUTORY. — A passenger is not guilty of contributory negligence, as a matter of law, if the train on which he was riding approaches a station, whose name is called out, and it stops for a moment, and then starts on, and he, believing the station to have been reached, and the train to be starting to leave it, steps from the cars, and is struck by a train moving in the opposite direction, though if he had looked ahead he would have seen the light of the advancing train, if he got off

at a place where passengers were permitted to alight, and when he knew of a rule of the corporation that an approaching train must be stopped, and not permitted to pass a train discharging passengers.

NEGLIGENCE, CONTRIBUTORY. — A PASSENGER ON A RAILWAY TRAIN has the right to assume that its rules will be enforced, and cannot be adjudged guilty of contributory negligence because he relied upon their observance, and omitted a precaution which, but for the existence of the rules, it would have been his duty to take.

William J. Jones, for the appellant.

Albert Constable, for the appellee.

BRYAN, J. Anderson recovered a judgment against the appellant, who was defendant below, for injuries received whilst he was a passenger on its railroad. The circuit court left it to the jury to find, on the evidence, whether the injuries were caused by the negligence of the defendant, and whether the plaintiff's own negligence contributed to produce them. The defendant contended that the case ought not to have been submitted to the jury; that there was no evidence of negligence on its part; and that the court ought to have ruled that the negligence of the plaintiff directly contributed to the injury.

The plaintiff testified at the trial that he was a passenger in the defendant's cars, and that he left Philadelphia on the night of the 11th of January, 1889, having a ticket which entitled him to passage to the city of Chester; that when they reached this place, "Chester" was called out, and the train was stopped; that he supposed that the train was at the Chester depot; that he got up and started to go out, and when he reached the platform the train started again; that he thought that the train was then leaving Chester, and as he did not wish to be carried to the next station, he stepped off, and just then the Philadelphia and Washington express came along, and knocked him down, broke his leg, and crushed his foot. The train in which the plaintiff was traveling was going west or south, and the express train which injured him was going east or north. It appears that Welsh Street is at the east end of the station platform, and Market Street is at the west end of it. The plaintiff testified that the train stopped at Welsh Street, but that he thought at the time it was at Market Street, which was at the other end of the platform, and that he stepped off on the left-hand side of the train; that at Market Street, on the right side of the train, there are safety-gates; that on the east side of the street they are four feet nine inches from the

cars, and on the west side about twenty-four inches from them; that the place where he stepped off is between the east and west bound tracks, and is called the six-foot way, but he had never measured the space, and did not know its exact width; that there are two platforms at Chester station, running the whole distance from Welsh to Market streets, one of them on each side of the railroad tracks. He further testified that when the train slowed up, and the name of "Chester" was called out, and the train stopped, he understood that he was at the station, and that the passengers for that station were to get off; that he was in a hurry to get off, as the train had started, and he thought that unless he got off at once he would be carried on to the next station; that no one called out or gave notice that the train had not reached the station, or told the passengers to keep their seats, and that he heard no warning of any kind; that the train was moving very slowly, and he alighted safely and securely on his feet; that just as he got his foot on the ground, he saw the headlight of a locomotive coming east; that he had barely time to turn around, when he was struck; he was knocked down, but he was not on the track.

On cross-examination he testified that he did not look to see where he was, because he was so positive that he was at Chester depot or Market Street crossing; that if he had looked from the right side of the car forward, he supposed that he would have seen the lights there (that is, the station lights); that he supposed that he was getting off very near the middle of Market Street; that he supposed that he was safe in getting off there; that he had no chance to look; that he knew all about the location of the station. He also testified that passengers get on or off the trains at Chester indifferently, on either side of it, — if they live south of the station, they generally get off on the left-hand side; if they live north of the station, they generally get off on the right-hand side, — except ladies, who take the right-hand side, because the platform comes up higher on that side, and the step is shorter; that fully one third of the passengers arriving at Chester from the east get off on the left-hand side; that he never knew or understood that there was any rule of the company against it, and never heard of any notice forbidding it, or of any protest from any agent of the company against it; that he knew that there was a rule of the defendant which forbade trains to pass a station when a train was receiving or discharging passen-

gers. There was other evidence corroborating the plaintiff's statements about the habit of passengers in getting on or off the train on either side. One of the witnesses says he never knew of any rule of the defendant which forbade it, and never saw or heard of any notice to that effect. Another witness, a policeman, testified that he had acted as officer for the defendant at the Chester depot when their officer was absent; that his practice was to help passengers on and off the trains on either side, and such was the practice of the regular railroad officer, and that there was no rule of defendant, which he ever knew or heard of, that was against leaving the cars on the side away from the platform. Rule 112 of the defendant was offered in evidence, as follows: "A train approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the passenger train."

We have not stated all the evidence, nor have we stated it in the order in which it was given at the trial. But the portions which we have quoted will suffice to illustrate the judgment which we have formed on the questions presented by this record. Carriers of passengers have in their charge the lives and safety of the persons whom they undertake to transport, and are subjected to a responsibility proportioned to the gravity of the trust reposed in them. They are bound to use the utmost degree of care, skill, and diligence in everything that concerns the safety of passengers, nor are their duties limited to the mere transportation of them. They are bound to provide safe and convenient modes of access to their trains, and of departure from them. In *Gaynor v. Old Colony etc. R. R. Co.*, 100 Mass. 208, 97 Am. Dec. 96, it was said: "The plaintiff was a passenger, and while that relation existed the defendants were bound to exercise towards him the utmost care and diligence in providing against those injuries which can be avoided by human foresight. He was entitled to this protection so long as he conformed to the reasonable regulations of the company, not only while in the cars, but while upon the premises of the defendants; and this requires of the defendants due regard for the safety of passengers, as well in the location, construction, and arrangement of their station buildings, platforms, and means of egress, as in their previous transportation." *Vide also Baltimore etc. R. R. Co. v. State*, 60 Md. 462, 463. But the degree of care which is exacted of these carriers is subject to a reasonable limitation; it is not

the utmost and highest, absolutely, but the highest which is consistent with the nature of their business; and there must be a due regard to its necessary requirements. The plaintiff was injured whilst he was a passenger; that is, during the time when he was under the defendant's protection; and the injury was inflicted by a train of cars running on the defendant's track, and under the control and management of its servants.

It seems to us that under these circumstances the defendant ought to be required to show that it used on the occasion the degree of care which the law imposed upon it, and that we may apply to this case the language of the late chief justice in *Baltimore and Ohio Railroad Co. v. Worthington*, 21 Md. 283; 83 Am. Dec. 578: "The cases of *Stokes v. Saltonstall*, 13 Pet. 181, and *Stockton v. Frey*, 4 Gill, 414, 45 Am. Dec. 133, conclusively establish the law that in such case the occurrence of the accident is *prima facie* evidence of negligence on the part of the defendants, throwing upon them the *onus* of rebutting the presumption by proving there was no negligence. Of course, that can be done only by proving the facts and circumstances explaining the cause of the accident, showing it to be such as could not have been guarded against by the utmost care and diligence; or in other words, by proving, in the language of Chief Justice Shaw, the 'most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers.'" But the question still remains whether the plaintiff, by his own negligence, contributed to the production of the injury. Before we express an opinion on this point, it is fit to take into view the incidents of the entire transaction. As the train approached the city of Chester, it slowed up; the name "Chester" was then called out, and the train stopped at the eastern end of the station platform; the plaintiff started to leave the car in which he was traveling, but when he reached the car platform the train had commenced to move on slowly; nevertheless, he stepped from the car, and was immediately struck by a train coming from the opposite direction. If he had looked ahead before he left the step of the platform, he would have seen the light of the advancing train, and could have avoided the danger. It is difficult to see why, after the speed was slackened, the name of the station was called out and the train was stopped, unless it was intended that the

passengers for that place should alight. The passenger who should draw this conclusion cannot be considered as forming an opinion which no reasonable man could entertain. The evidence does not inform us why the name was called out, and why the train was stopped, unless this was the purpose; nor does it show why, after a momentary pause, it afterwards slowly proceeded. If the discovery of the approaching train caused any change of purpose on the part of the conductor, it would have been reasonable to communicate this change to passengers whose safety might be affected by it. If any reason had been made known to the plaintiff for the stopping of the train, and the announcement of the name of the station, we would have had more light on the nature and character of his act. But without some aid of this kind, we are unable to say that the inference of negligence on his part is certain and incontrovertible, and consequently we cannot declare it as a question of law: *Cumberland Valley R. R. Co. v. Maugans*, 61 Md. 53; 48 Am. Rep. 88. He made his exit from the car in safety, but was immediately confronted by a great danger. If he had looked forward, he might have seen and avoided it. But here we must bear in mind the circumstances attending his exit from the cars. He was getting off at a place which, with the knowledge and permission of the defendant, was habitually used for this purpose; and he knew, moreover, that it was the defendant's duty to use all possible care to make this place safe for him. And he knew that by a special rule, it had declared that when his train was discharging passengers, an approaching train must be stopped, and not be allowed to reach it. Now, assuming that he supposed that he was to be discharged as a passenger at that place, he would necessarily and unavoidably infer that he would be safe if the railroad company observed this rule. Undoubtedly he had a right to assume that this rule would be enforced, and relying upon the assurance guaranteed by the rule, he was dispensed from the necessity of using the degree of care ordinarily required of persons who go on or near railroad tracks.

This was decided in *Baltimore etc. R. R. Co. v. State*, 60 Md. 449. In that case a passenger was killed at a railroad station, while attempting to cross a track on his way from one train to another. The question was on the degree of care which he was bound to use. The circuit court refused an instruction, prayed by the railroad company, to the effect that if the deceased left a place of absolute safety, and voluntarily went on

the track in order to board a passenger train, and that if by the exercise of ordinary care, caution, and prudence on his part he could have known of the danger of attempting to cross the track, or of being on it for any purpose at that time, and that if he did not exercise such care, caution, and prudence, then he was guilty of contributory negligence. This court decided that the prayer was properly refused. In a very clear and well-reasoned opinion, the present chief justice pointed out the distinction between the obligations of passengers, in this regard, and other persons not sustaining this relation to the carrier. He says: "In leaving the train from Hagerstown, at the station, and in crossing over the intervening track from one platform to the other, in order to take the east-bound train, the deceased might well assume that the defendant would not expose him to any danger which, by the exercise of due care, could be avoided. And though the deceased himself was required to exercise reasonable care, yet we may suppose that his watchfulness was naturally lessened by his reliance upon the faithful observance by the employees of the defendant of such precautionary rules and regulations as would secure to passengers a safe transfer from one train to the other. And except in the presence of immediate apparent danger, he was authorized to act upon such reliance. For the general rule that applies in ordinary cases of parties crossing railroad tracks, that they should stop, look, and listen before making the venture, does not apply in a case like the present. In such case as this, the rule is, as established by a number of well-considered cases, that the passenger of the railroad is justified in assuming that the company has, in the exercise of due care, so regulated its trains that the road will be free from interruption or obstruction when passenger trains stop at a depot or station to receive and deliver passengers": *Baltimore etc. R. R. Co. v. State*, 60 Md. 463. And in dealing with the prayer which we have quoted, he says: "It entirely ignored the fact that the deceased was a passenger, and was entitled to the protection of a passenger in passing over the intervening track to board the train that was to take him on his way to Frederick. It required of the deceased the exercise of care and caution to ascertain whether there was danger of a passing train, before attempting to cross the track to board the train that he was required to take; whereas he was, unless he saw or knew of the approaching train, justified in acting upon the implied assurance that no train would be al-

lowed to pass the station to obstruct the transfer of passengers from one train to another": *Baltimore etc. R. R. Co. v. State*, 60 Md. 465. We do not see how we can hold as a matter of law, that the plaintiff was guilty of contributory negligence because he did not look out for the approaching train before he left the car in which he was traveling. In our opinion, the whole question was properly left to the jury, by the instructions given at the trial.

Judgment affirmed.

CARRIERS — PASSENGERS. — Slowing up a train which is approaching the station, sounding the whistle, announcing the name of the station, and stopping the train must be construed to mean a direction to the passengers to get off then and there, and they have the right to presume that it is a safe place to alight. If one receives an injury in alighting under such circumstances, because the place is one of danger, he may recover damages from the company: *McGee v. Missouri P. R'y Co.*, 92 Mo. 208; 1 Am. St. Rep. 707, and note; *Smith v. Georgia P. R'y Co.*, 88 Ala. 538; 16 Am. St. Rep. 63, and note. Compare *New York etc. R'y Co. v. Doane*, 115 Ind. 435; 7 Am. St. Rep. 451, and note. As to the duty of a carrier to inform a passenger, when such information would tend to prevent his exposing himself to danger and injury, see extended note to *Hemmingway v. Chicago etc. R'y Co.*, 7 Am. St. Rep. 830-836.

ACCIDENT AS EVIDENCE OF NEGLIGENCE. — There are many cases in which the nature of the accident may itself establish a *prima facie* case of negligence against a defendant, and cast upon him the burden of proof to show that such accident occurred without his fault. In all such cases, it devolves upon the plaintiff to prove only that the accident happened, and he is then entitled to recover without further proof, unless the presumption thus arising is rebutted.

A presumption of negligence arises from the occurrence of an accident alone, when it "proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible": *Transportation Co. v. Downer*, 11 Wall. 129; *Moore v. Parker*, 91 N. C. 275. This rule has often been applied in cases of injuries to passengers by railroads or other common carriers. A rebuttable presumption arises from the simple occurrence of an accident that negligence on the part of a railway existed, where the injury is inflicted under circumstances from which the inference may be fairly drawn of non-performance of duty on the part of the railway.

The rule has thus forcibly and clearly been laid down in late cases that "when an injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge or wheel or axle, or by any other accident occurring on the road, the presumption *prima facie* is, that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some other cause which human care and foresight could

not prevent": *Baltimore etc. R. R. Co. v. Wightman*, 29 Gratt. 431; 26 Am. Rep. 384; *Baltimore etc. R. R. Co. v. Noell*, 32 Gratt. 394; *Louisville etc. R'y Co. v. Snyder*, 117 Ind. 435; 10 Am. St. Rep. 60, where it is said that "the burden of overcoming the presumption of negligence arising from evidence of the occurrence of an accident and injury to a passenger is upon the carrier"; and citing *Memphis etc. Packet Co. v. McCool*, 83 Ind. 392; 43 Am. Rep. 71; *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346; 49 Am. Rep. 168; *Cleveland etc. R. R. Co. v. Newell*, 104 Ind. 264; 54 Am. Rep. 312; *Bedford etc. R. R. Co. v. Rainbolt*, 99 Ind. 551; *Anderson v. Scholey*, 114 Ind. 553; *Louisville etc. R'y Co. v. Pedigo*, 108 Ind. 481.

Many other cases are to the same effect, among which may be cited the following: *Tuttle v. Chicago etc. R'y Co.*, 48 Iowa, 236; *Baltimore etc. R. R. Co. v. State*, 63 Md. 135; *Pittsburg etc. R. R. Co. v. Pillow*, 76 Pa. St. 510; 18 Am. Rep. 424; *New Jersey R. R. etc. Co. v. Pollard*, 22 Wall. 341; *Central R. R. Co. v. Brinson*, 64 Ga. 475; *Southwestern R. R. Co. v. Singleton*, 67 Ga. 303; *Georgia R. R. Co. v. Newsome*, 60 Ga. 492; *Sullivan v. Philadelphia R. R. Co.*, 30 Pa. St. 234; 72 Am. Dec. 698; *George v. St. Louis etc. R'y Co.*, 34 Ark. 613; *Central R. R. Co. v. Sanders*, 73 Ga. 513; *Coudy v. St. Louis etc. R'y Co.*, 85 Mo. 79; *Vicksburg etc. R. R. Co. v. Phillips*, 64 Miss. 693. The rule laid down in *Philadelphia etc. R. R. Co. v. Anderson*, 94 Pa. St. 351, 39 Am. Rep. 787, that where a passenger is injured by an accident arising from a collision, or a defect in the machinery or road-bed, he is required, in the first place, to prove no more than the fact of the accident and the extent of the injury, to entitle him to recover, and that a *prima facie* case is thus made out, and the burden of proof is cast upon the carrier to disprove negligence, has been applied in many cases and under many circumstances, a few instances of which will be given below. Proof that a collision took place, and that plaintiff was thereby injured, is *prima facie* evidence of negligence or want of care on the part of the servants of the company, and casts the burden of proof on it to show that its employees in charge of the colliding locomotive were in all respects qualified, and that they acted with reasonable skill and the utmost caution, and that the collision could not have been avoided by any human care or foresight: *New Orleans etc. R. R. Co. v. Albritton*, 38 Miss. 242; 78 Am. Dec. 98; *Iron R'y Co. v. Mowery*, 36 Ohio St. 418; 38 Am. Rep. 597.

The same rule applies where a car is derailed and thrown from the track from any cause, whereby a passenger is injured: *Peoria etc. R. R. Co. v. Reynolds*, 88 Ill. 418; *Hipsley v. Kansas City etc. R. R. Co.*, 88 Mo. 348; *Seybolt v. New York etc. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75; *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *Curtis v. Rochester etc. R. R. Co.*, 18 N. Y. 534; 75 Am. Dec. 258; *Little Rock & Ft. S. R'y Co. v. Miles*, 40 Ark. 298; 48 Am. Rep. 10; *Lockwood v. Chicago etc. R'y Co.*, 55 Wis. 50. In *Edgerton v. New York etc. R. R. Co.*, 39 N. Y. 227-229, it was said that "whenever a car or train leaves the track, it proves that either the track or machinery, or some other portion thereof, is not in proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in proper condition, and to operate it with the necessary prudence and care, has, in some respect, violated his duty."

The rule has often been invoked where the accident happened because of a broken rail: *George v. St. Louis etc. R'y Co.*, 34 Ark. 613; *Heazle v. Indianapolis etc. R'y Co.*, 76 Ill. 501; *Pittsburgh etc. R. R. Co. v. Williams*, 74 Ind. 462; *Cleveland etc. R'y Co. v. Newell*, 75 Ind. 542. A presumption of negligence

against the railroad company arises from the fact that an injury to a passenger occurs from the train breaking through a bridge: *Bedford etc. R. R. Co. v. Rainbolt*, 99 Ind. 551; *Louisville etc. R'y Co. v. Snyder*, 117 Ind. 435; 10 Am. St. Rep. 60. So where a passenger is injured by an accident caused by the washing away of a railroad embankment, the accident is presumptive evidence of the carrier's negligence, and the rule applies against the lessee of the road: *Philadelphia etc. R. R. Co. v. Anderson*, 94 Pa. St. 351; 39 Am. Rep. 787.

A presumption of negligence arises from an accident caused by the bursting of the boiler of a locomotive-engine: *Robinson v. New York etc. R. R. Co.*, 2 Blatchf. 338; *Illinois etc. R. R. Co. v. Houck*, 72 Ill. 285; *Illinois etc. R. R. Co. v. Phillips*, 49 Ill. 234. The fall of a berth in a sleeping-car, injuring a passenger, raises a presumption of negligence, which, in the absence of other evidence, makes the railroad company liable: *Railroad Company v. Walrath*, 38 Ohio St. 461; 43 Am. Rep. 433. So an injury to a passenger caused by the mere falling of a shade to a lamp in the car is sufficient, in the absence of other evidence, to authorize the inference of negligence on the part of the railroad company: *White v. Boston etc. R. R. Co.*, 144 Mass. 404. Other instances of similar nature are given in the note to *Huey v. Gahlenbeck*, 6 Am. St. Rep. 794.

The rule governing accidents occurring on railroad trains is applied with equal force in other cases of common carriers, where the mere proof of an accident causing an injury to a passenger raises the presumption that the carrier was negligent: *Carter v. Kansas City Cable R'y Co.*, 42 Fed. Rep. 37; *The Reliance*, 4 Woods, 420; *Rose v. Stephens etc. Transp. Co.* 20 Blatchf. 441. Thus in case of collision between the cars of a street-railway company, the presumption of negligence arises: *Smith v. St. Paul City R'y Co.*, 32 Minn. 1; 50 Am. Rep. 551, and note 553; or where a street-car comes into collision with a bridge, through the carelessness of the driver of the car: *Wilkerson v. Corrigan etc. Street R'y Co.*, 26 Mo. App. 144; or where the accident was caused by the car running off the track: *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; 12 Am. Rep. 720. Or where the car is started with an unusual jerk which throws the passenger against the car window and lacerates his hand before he can be seated in the car, a *prima facie* case of negligence exists against the carrier: *Dougherty v. Missouri Pacific R. R. Co.*, 9 Mo. App. 478; affirmed 81 Mo. 325; 51 Am. Rep. 239.

The rule has been applied in cases of injury to passengers by stage-coaches, arising from an accident such as the upsetting of the vehicle: *Stokes v. Saltonstall*, 13 Pet. 181; *Boyce v. California Stage Co.*, 25 Cal. 468; or where one of the wheels of the coach came off and it was upset: *Ware v. Gay*, 11 Pick. 106; or where one of the wheels of the coach broke down: *Lawrence v. Green*, 70 Cal. 417; 59 Am. Rep. 428.

In the case of *Sanderson v. Frazier*, 8 Col. 79, 54 Am. Rep. 544, where the injury was sustained through the overturning of a stage-coach, it was decided that the passenger was not necessarily negligent in having his arm outside the window, and that proof of the upsetting of the coach was *prima facie* evidence of the negligence of the owner. The court adopted the language of a previous case involving similar facts, where it was said (*Wall v. Livezey*, 6 Col. 465): "A *prima facie* case, however, is made out by proof that the relation of carrier and passenger existed between the parties; that an accident occurred resulting in injury to the passenger; and that it was occasioned by the failure of some portion of the machinery, appliances, or means provided for the transportation of the passengers. This proof being

made, a presumption of negligence on the part of the carrier arises, and the plaintiff is not bound to go further, and show the particular defect or cause of the accident, until the presumption is rebutted. It devolves upon the carrier to rebut this presumption by evidence that he exercised the greatest care and diligence practicable under the circumstances."

So the fact that a steamboat bursts her boiler, and thus injures a passenger, creates a presumption of negligence: *The Sidney*, 27 Fed. Rep. 119. The fact that a gang-plank, placed for the use of passengers in landing from a steamboat, fell while a passenger was walking over it, is *prima facie* evidence of negligence by the officers of the boat, and raises a presumption which must be rebutted by the defendant: *Eagle Packet Co. v. Defries*, 94 Ill. 598; 34 Am. Rep. 245. In *Memphis etc. River Packet Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71, where a passenger on a boat was injured by the fall of a bale of cotton goods from the top of a stairway, the court decided that when a passenger has been injured in an accident occasioned by the act of the carrier's servant, it is presumed that the act was negligent, and that the carrier must rebut the presumption.

The rule that the mere happening of an accident causing an injury furnishes evidence of negligence on the part of the defendant and establishes a *prima facie* case which entitles the plaintiff to recover, without more, unless the presumption thus arising is rebutted, has been applied in a number of cases other than those arising where the relation of passenger and carrier existed. Thus where it was the duty of the defendant to keep a bridge in repair, and the plaintiff was found, about midnight on a dark night, lying underneath the bridge, in an injured condition, and said that he had fallen from the bridge, but did not state as to how he fell, it was decided that this was evidence that the fall was caused by want of proper railing and protection about the bridge, which raised a presumption of negligence to be rebutted by the defendant: *Hays v. Gallagher*, 72 Pa. St. 136. The fact that an accident happened because telegraph wires were left swinging across a street at such a height as to obstruct ordinary travel, or endanger the safety of persons passing in vehicles, is itself evidence of negligence on the part of the telegraph company, which, unexplained and unaccounted for, will authorize a recovery by the plaintiff: *Thomas v. Western Union Telegraph Co.*, 100 Mass. 156. Or where a building adjoining a street or highway falls so as to injure persons lawfully therein, the mere happening of the accident, in the absence of explanatory circumstances, raises a presumption of negligence which must be rebutted by the owner of the building: *Mullen v. St. John*, 57 N. Y. 567; 15 Am. Rep. 530. The fact that plaintiff was injured by a plank falling from defendant's premises is sufficient, *prima facie*, to charge the latter with negligence: *Chaire v. National City Bank*, 1 Sweeny, 539. So the fact that the wall of a cistern which was being constructed by a city fell by its own weight, or by the pressure of gravel and earth against it, placed there by the city, raises the presumption of negligence against the city: *Mulcairns v. City of Janesville*, 67 Wis. 24. If a party, not at fault, is injured by the fall of ore from a bucket which overturned while it was being hoisted, this raises a presumption and establishes a *prima facie* case of negligence against the party employing the men in charge of the handling of the bucket: *Cummings v. National Furnace Co.*, 60 Wis. 603.

It may be stated, as a general rule, that an accident destroying property, caused by the escape of fire from a railroad engine, is *prima facie* evidence of negligence on the part of the railroad company in the construction and management of such engine: Note to *Burroughs v. Housatonic R. R. Co.*, 38 Am.

Dec. 71, showing this rule to be supported by the weight of authority, although the cases are conflicting. In cases of accident resulting in the killing of stock while on the track of a railroad, the rule seems to be that the killing establishes a *prima facie* case of negligence against the company, if the animal killed or injured was lawfully at large, or the track is required by law to be, but is not, fenced. In other cases, the presumption of negligence does not arise from the mere fact of the killing, and the negligence on the part of the company must be proved by plaintiff. This question is generally controlled by statutes in the different states: Note to *Savannah etc. R'y Co. v. Geiger*, 58 Am. Rep. 703-707; *Little Rock & F. S. R'y Co. v. Finley*, 37 Ark. 562.

Some cases are found in which the courts have refused to apply the rule considered above. Thus in *Federal etc. R'y Co. v. Gibson*, 96 Pa. St. 83, it was said that "while in many cases the mere fact of an injury to a passenger on a railway car raises the presumption of want of care, as where the injury results from a defective track, cars, machinery, or motive power, yet where a passenger in a railway car is injured by the act of a third party, over whom the railway company has no control, the burden of proof is upon the passenger to show that the company was guilty of the negligence whereby the injury was caused." Hence the fact that such passenger was struck and injured by a passing load of hay is not *prima facie* evidence of negligence on the part of the company. Proof that a plaintiff was injured while leaving a ferry-boat in the dark, by being caught between the boat and the slip, and that a chain used to prevent the premature egress of the passengers had, though not through the fault of the servant having it in charge, been removed before the boat was secured, is no evidence of negligence against the ferry-boat company: *Joy v. Winnisimmet Co.*, 114 Mass. 63. Proof of injury, and the failure of a ferry-boat company to supply a safe and sufficient drop over which to pass, does not of itself raise a presumption of negligence against the company: *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312; 87 Am. Dec. 717. An injury sustained from the falling of a car door of a freight-car upon a person passing along the street is not evidence, of itself, of negligence on the part of the railroad company: *Case v. Chicago etc. R'y Co.*, 64 Iowa, 762. Proof of a collision between a railroad train and a street-car, in which the party injured was a passenger, does not raise a presumption of negligence against the railroad company: *Philadelphia etc. R. R. Co. v. Boyer*, 97 Pa. St. 91. The mere fact that a passenger, after arriving at his destination, was injured in attempting to alight from the railroad train affords no evidence of negligence on the part of the company: *Delaware etc. R. R. Co. v. Napheys*, 90 Pa. St. 135.

The fact that a person is injured while attempting at night to enter a train while it is standing at a station is not evidence, by itself, of negligence on the part of the company: *Chicago etc. R. R. Co. v. Trotter*, 60 Miss. 442; especially if such person has been warned not to make the attempt: *Baltimore etc. R. R. Co. v. State*, 63 Md. 135. And an accident from a collision between a railroad train and a private vehicle at a crossing, by which a person on the vehicle is injured, is not evidence from which an inference of negligence on the part of the railroad company can be drawn: *Annapolis etc. R. R. Co. v. Pumphrey*, 72 Md. 82; *Deikman v. Morgan's Louisiana etc. R. R. etc. Co.*, 40 La. Ann. 787. The killing of a person by striking him at night, while he is upon the track, and when he is not an employee or passenger of the company whose train inflicts the injury, raises no presumption of negligence against the company: *State v. Philadelphia etc. R. R. Co.*, 60 Md. 555.

The fact that a person on the street is injured by the fall of a red-hot cinder from the locomotive of an elevated railroad is not sufficient to establish a *prima facie* case of negligence against the railway company: *Searles v. Manhattan R'y Co.*, 101 N. Y. 661; although a contrary conclusion was reached in *Weidmer v. New York Elevated R. R. Co.*, 41 Hun, 284, where it was held that such an accident established a *prima facie* right to recover, and casts the burden of proof on the company to show an absence of negligence on its part.

Proof of an accident by which an injury is received from the fall of a bust placed in a concert hall as a decoration is not sufficient to establish the defendant's negligence: *Kendall v. Boston*, 118 Mass. 234; 19 Am. Rep. 446.

Where a person employed to assist in the construction of a saw-mill is injured by the explosion of a steam-boiler owned and used by the defendant, on the premises, to operate the mill, the mere fact of the explosion will not raise a *prima facie* presumption of negligence on the part of the owner: *Huff v. Austin*, 46 Ohio St. 386; 15 Am. St. Rep. 613. Negligence cannot be inferred from the facts of an excavation in making a tunnel, and an injury, it being alleged that such excavation removed the natural support of a house; but in such case want of care and skill in digging the tunnel must be alleged and proved: *Ward v. Andrews*, 3 Mo. App. 275.

For a further discussion of the subject here considered, reference is made to the notes to *Huey v. Gahlenbeck*, 6 Am. St. Rep. 792, and *Smith v. St. Paul etc. R. R. Co.*, 50 Am. Rep. 553.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

BROWN v. GILCHRIST.

[80 MICHIGAN, 56.]

MASTER AND SERVANT — FELLOW-SERVANTS — NEGLIGENCE OF FOREMAN —

A foreman who has charge of his employer's freight and coal business and the unloading of vessels laden with coal, as well as the absolute power to employ, direct, and control the other men employed in the master's business, is not a fellow-servant with them, so as to relieve the master from liability for the negligence of the foreman in performing the duties within the scope of his employment.

CONTRIBUTORY NEGLIGENCE. — In actions for injuries caused by the alleged negligence of another, the injured party must be free from fault, to sustain his action. Hence, in such actions, it is error to refuse to charge that "if plaintiff's own negligence caused or contributed to the injury, he cannot recover," when there is evidence to support such charge.

NEGLIGENCE. Action to recover for personal injuries. Judgment for plaintiff, and defendants bring error.

Frank Emerick, and Depew and Rutherford, for the appellants.

Turnbull and Dafoe, for the respondent.

LONG, J. The defendants, at the time of the injury complained of, were carrying on the coal and freight business at Alpena, in this state, keeping a dock and warehouse, and receiving freight from boats engaged in domestic commerce. Their freight-house, office, and coal-dock were all on the same dock, near together, and the bins into which the coal was put were about eighteen feet from the edge of the dock, and about eight feet high. The manner in which the coal was unloaded from the vessel was, that horses, a quantity of which were kept constantly on hand, were placed along the dock, and running-

boards laid on top, extending from the top of the bin, over the rail of the vessel, to the hatchways, and the ends of the hatchways supported by two upright pieces on each side of the hatch, through which iron pins were run, and a plank or scantling placed across the side of the hatch, resting on these pins, the planking of the runway resting on this transverse scantling, about eight feet above the hatch.

The defendants had in their employ a Mr. Reed, who was a foreman, looking after the unloading of the boats, and attending to the freight business of the firm generally. On June 30, 1888, the barge Westford lay at the dock, laden with coal. She had two hatchways, and two runways were placed from the bin, — one to each hatch. These were erected, under the direction of Mr. Reed, on that morning, by the laborers who were there to unload the coal. Mr. Reed pointed out to them where the horses and planking were, and they built the runways from the material so furnished, and before the plaintiff came there to work. It appears that the plank or timber resting on the iron bars was a two-by-eight or two-by-ten white pine, about twelve feet long, resting on the pins, which were some eight feet apart. In order to hoist the coal from the hold of the vessel, a pulley was attached to the mast, a rope run through, to one end of which was attached a bucket, and the other end wound around a drum in the hold, the drum being revolved by an engine used for that purpose. This drum operated the two buckets, one for each hatch, and going up and down at the same time. To operate these buckets, which held about a half-barrel each, a man, called a "dumper," stood on the end of the runway, over the edge of the hatch, and steadied the rope so that the bucket could not catch on the end of the planking; that is, he held the rope away far enough so that the bucket could come up safely. This coal was emptied into wheelbarrows on the runway, — two barrows being used for each runway, and a man for each barrow, who came up with the barrows, alternately, a turnout being upon the runway for the purpose of their passing each other.

The plaintiff, on the morning of June 30, 1888, went with a Mr. Hite to the defendants' docks to get employment, — he and Hite having learned that two men were going to quit. They were accustomed to this kind of work, and had before assisted in unloading vessels. Arriving at the dock, Hite spoke to Reed about working, who said: "All right; go to work"; and Hite then turned to the plaintiff, and told him it was all right, and

they went to work, and Reed took the time. The plaintiff went to work on the after-scaffold, wheeling coal. The plaintiff testifies as follows, as how the injury occurred: "I wheeled for some time, when they stopped to lengthen out the line, as the coal was getting lower in the hold of the boat, and we thought that was a good time to go down, and answer a call of nature. In returning, the other two men happened to get on the staging before I did. One of these men was tending to the buckets coming up, so that they would not catch on the staging, and the other man was wheeling along with me; that is, he was wheeling his own barrow. I saw John Reed (the defendant's foreman) standing on the rail of the boat, and he says: 'Brown, we are waiting for you.' I says: 'All right; you won't have to wait long on me.' With that, I got upon the staging, and the other man was going to take my wheelbarrow. 'Never mind,' says I; 'I will take my own wheelbarrow. Stand aside.' With that he stood aside, and I went to catch up my own wheelbarrow. I had it up. Down went the scaffolding, and I was pitched backward in the hold. I struck right on my back, and there came part of the staging onto my leg, and broke it in two places, and my back was hurt more than my leg."

Plaintiff also gave testimony showing that he was seriously and permanently injured. He also gave testimony tending to show that this plank, resting upon the iron pins holding the running-boards, broke near the center, between the pins, thus causing the fall of the plank, which precipitated his fall into the hold of the vessel, twenty feet below, and that this plank or scantling so broken was worm-eaten, and contained knots, and was wholly unfit for the purpose for which it was being used.

The claimed negligence set out in the declaration is, that the defendants, not regarding their duty in this behalf, erected, and caused to be erected, said scaffold or platform and gangway out of rotten and unsound timbers and material, so that the same gave way, and fell while the plaintiff was working thereon. The declaration charges a duty upon the defendants to build such scaffold of strong and sound timbers and materials, and in a strong and substantial manner, so that the same would not fall while plaintiff was working thereon.

The defendants gave testimony tending to show that this timber was sound, contained no knots, and was of sufficient strength for the purposes for which it was being used, and that

the accident occurred by reason of the fact that these men left their places, and on returning — two wheelbarrows being there, loaded with coal — the dumper could not reach out to guide the rope, so that the bucket caught on the end of the planking extending over the edge of the hatch, lifting them up for a distance, and that, in falling with the weight of the three men and the coal, they broke the scantling, and that this was the occasion of the injury.

Mr. Redman, who was standing near, gave his version of the casualty, as follows: "Mr. Brown went after a drink, and the bucket came up, and my nephew, he dumped Mr. Brown's bucket; and at that time the bucket went down, and they loaded her with coal again, and the other bucket came up. At that time Mr. Brown just got back there by the wheelbarrow when this bucket was swinging back and forward, and it struck this staging, the same as here, and raised it up, and it fell down, and broke it through. The bucket was swinging backward and forward, and coming up at the same time. I suppose the dumper did not stop it because he could not get at it. It was on that side; and Mr. Brown being here with his full wheelbarrow, he could not reach over there. Brown left his wheelbarrow standing at the end of the scaffold where it was loaded. At that time the other wheeler was just coming back with his wheelbarrow. My nephew dumped the bucket in Brown's barrow. He was the wheeler there, and the barrow stood waiting Brown's return. My nephew was standing on one side, the dumper on the other, the bucket swinging back and forward. Brown got in between the handles of his barrow, when it broke down."

The captain of the barge and others gave the same version of the accident. Defendants also gave testimony tending to show that they had plenty of good material to make scaffolding from; and one of the men working upon it, and who helped build it, testified that he selected this timber that broke from a pile of lumber in defendants' mill-yard, which is just adjoining the dock, and that it was a new piece.

There seems to be no controversy but that Mr. Reed set the men to build the scaffold, and that the plaintiff was not there at the time. Neither does there seem to be much controversy as to the position which Reed occupied. Defendant Bedford testified that "Reed was acting in the capacity of a kind of foreman, looking after unloading boats, and attending to the freight business generally."

On the question of the defendants' providing plenty of suitable and good material of which to construct the scaffold, some considerable testimony was given, from which it appears, under the testimony of Mr. Reed, that the material for this structure was kept piled upon the dock beside the coal-bins; that the defendants had about fifteen dock-horses and two sets of deck-horses to go on the boat, and twenty to twenty-five running-boards, and lots of cross-pieces. And Mr. Reed testifies that he did not think the stick which broke could have been knotty or worm-eaten, "because there is lots to put in there," and that he stood there, and told the men who put this scaffold up, "if there was not enough there, there was lots in the mill-yard." Mr. Otto Redman, working on the platform, says that he helped put the scaffold up; that the stick was a piece of Norway; and that they picked it out for themselves to work on, and had a whole pile in the mill-yard to select from.

The contention of the defendants' counsel is, — 1. That the defendants provided plenty of suitable and good materials of which to construct the scaffold; 2. That they placed the oversight and charge of building it with a competent and fit servant; 3. That the same was put up under the direct personal supervision and direction of Reed, the defendants not being present or superintending or directing in person the erection, or the selection of the materials of which it was composed.

Counsel claims from these facts it follows, as a matter of law, that defendants had discharged the full measure of their duty towards the plaintiff; that is, that when the master has furnished all necessary and proper and safe material, and a competent and fit foreman, to whom he intrusts the whole supervision of the work being carried on, he is no longer responsible, and for the negligence of the foreman he cannot be held responsible. This claim is based upon the proposition that Reed is the fellow-servant of the plaintiff, and if this is true the learned counsel is correct in his conclusions; but if Mr. Reed was a superior servant, standing in the place of the master, then the master would be held liable.

This is a question upon which the courts are not in harmony, and each case is so dependent upon its own peculiar facts that it is difficult to lay down any general rules by which all cases can be governed. Here the facts are, that the defendants gave over to Reed the entire charge of selecting the materials, and putting up the scaffold, and unloading the coal; and he had authority, or at least exercised it upon that occa-

sion, to employ the men to do the work. This of itself is strong evidence that he stood in the place of the defendants, representing them in the work, and was not an ordinary employee. The contract of employment with the plaintiff was, that he should have a safe place to work, and the law imposed upon the defendants the duty to furnish such a place. If the scaffold had been erected under the supervision and direction of one of the defendants themselves, and the casualty had occurred, as claimed by the plaintiff, by reason of the defective, worm-eaten, and knotty timber, which the defendants knew, or by reasonable care could have discovered, was dangerous in that place, then the plaintiff would have had the right to recover for such injuries, unless himself negligent. I am not prepared to say that the master, under such circumstances, can shift his responsibility by the selection of a foreman; and I do not understand that this doctrine has ever been held by this court.

Counsel cites *Quincy Mining Co. v. Kitts*, 42 Mich. 34, as upholding that doctrine and sustaining his position. The rule is expressly laid down in that case that "the duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation; and if it becomes necessary to intrust its performance to a general manager, foreman, or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risks of his negligence."

While it is the truth that under the circumstances of that case it was held that the company could not be held liable, yet it is expressly stated that the court looked in vain for any evidence appearing in the record that Wagner was negligent. Some general rules were laid down in that case, but they related to the case then in hand, which was very different from the present.

Counsel also cites *Hoar v. Merritt*, 62 Mich. 386, as sustaining the rule. But a critical examination of that case shows a very different state of facts than the present. There the defendant, Merritt, in building his house, furnished plenty of good materials, which were actually used in building the scaffold. He had an architect employed by the month; and competent carpenters, acting under him, built the scaffold for their own use in putting up the cornice to the building. After the cornice was completed, the defendant employed Mr. Zryd

to do the painting. The plaintiff was engaged by Zryd to assist in this work; and going upon the scaffold, it gave way, and he was injured. The material furnished was good, and there was no explained reason why it fell. It was not, therefore, questioned that the carpenters who built the scaffold were competent, and that they selected good materials. Neither did they build it for the use of the painters. Another important feature existing in the present case did not appear in that. Here Mr. Reed not only had the full charge of the men, but employed them, and directed their work. They were not shown to be carpenters, or in any way qualified to select good material, or competent to erect a proper and safe scaffold; and if the testimony of the plaintiff and his witnesses is true, they erected a very unsafe one, and from material not fit for that purpose, and which they placed where the most danger should have been apprehended,—upon the edge of the hatch, and over a hole twenty feet in depth. The power and authority given to Mr. Reed far exceeded the authority given Gregory in *Hoar v. Merritt*, 62 Mich. 386. Counsel, in his brief, even uses the argument that, because Reed had such absolute control and direction in and about the business there, the defendants could not be held responsible. He says: "And there is absolutely no ground on this record, for any claim that either of the defendants was present or superintending or directing in person the erection of this scaffold, or the selection of the materials of which it was composed." That is, because the defendants had delegated the authority to Mr. Reed to select proper materials, and to direct, control, and superintend the erection, they should escape liability. If this were the rule, then the more they remained away from their business,—the greater power and authority they gave a foreman or manager to select material, employ men to build a safe and proper scaffold, upon which other servants, who had no knowledge of the manner of its construction, were to be invited to work,—the less the liability. It is the duty of the master to furnish the servant a safe place to work upon, and he cannot shift this responsibility by saying: "The foreman whom I employed was selected with care, and for his fitness for the work intrusted to him. I pointed out to him all necessary and proper material; and therefore, though he did not make a proper selection of material, and did not build a safe structure, my hands are clean, and no responsibility rests with me. I have discharged the full

measure of my duty to the men whom he guides and controls."

Especially is this true if it appears, as in this case, that he has intrusted the entire management and control of that business in the hands of such foreman, with power to employ the men, and he himself retires from any direction and control over it. Mr. Reed apparently had this authority; and from the manner of the accident claimed by the plaintiff, it is evident that the men selected by Mr. Reed to find the timber to support these running-boards were wholly unfit to build such a scaffold. It was Reed's duty to examine this scaffold, and see that it was properly built, before sending the plaintiff there to work; and under the authority delegated to him by the defendants, and the control he assumed of affairs there, he stands in their place, and they must assume the risks of his negligence. Upon this branch of the case, the instructions given by the circuit judge were proper.

The court was in error in refusing the defendants' seventh request to charge, as follows: "If plaintiff's own negligence caused or contributed to the injury, he cannot recover."

The court should have directed the attention of the jury to the claim made by the defendants' counsel as to the negligence of plaintiff. The theory of the defendants was, that the plaintiff, and the others with whom he was working upon the runway, went away, and left the wheelbarrows there in such a position that the dumper could not properly control the rope, thus permitting the bucket to catch the end of the scaffold, and raising it; and when loosened, it dropped back upon the cross-piece, which, with the added weight of the coal and both barrows, and the three men, caused the breaking. If the breaking of the cross-piece was caused in this manner, and resulted from the negligence of the plaintiff or the men immediately employed with him, or by their negligence in this regard they contributed to the injury, the plaintiff could not recover, and the jury should have been so instructed. It was probably an oversight in the trial judge in refusing this request, as the rule is undoubtedly well understood by the learned circuit judge that in all actions for injuries caused by the alleged negligence of another, the plaintiff himself must be free from fault, to sustain his action.

The judgment must be reversed, with costs, and a new trial ordered.

MASTER AND SERVANT — WHO IS NOT A FELLOW-SERVANT, BUT A VICE-PRINCIPAL. — Where the master appoints a middleman, with full power to employ or discharge those under him, and with full control of the work over which he is placed, such middleman is a foreman or vice-principal, for whose negligence the master is responsible: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note citing the principal case; *International etc. R'y Co. v. Prince*, 77 Tex. 560; 19 Am. St. Rep. 795; *Richmond etc. R. R. Co. v. Williams*, 86 Va. 165; 19 Am. St. Rep. 876; *Galveston etc. R'y Co. v. Smith*, 76 Tex. 611; 18 Am. St. Rep. 78, and note; *St. Louis etc. R'y Co. v. Weaver*, 35 Kan. 412; *Boatwright v. Northeastern R. R. Co.*, 25 S. C. 128; *Louisville etc. R'y Co. v. Graham*, 124 Ind. 89; *Coleman v. Wilmington etc. R. R. Co.*, 25 S. C. 446.

CONTRIBUTORY NEGLIGENCE. — One cannot recover for an injury sustained, if he himself was guilty of negligence: *Pauling v. Hoskins*, 132 Pa. St. 617; 19 Am. St. Rep. 617, and note. However, contributory negligence cannot be invoked as a defense, unless it is a proximate cause of the injury: *North Birmingham St. R'y Co. v. Calderwood*, 89 Ala. 247; 18 Am. St. Rep. 105; *Dandie v. Southern P. R. R. Co.*, 42 La. Ann. 686; *Novock v. Michigan C. R. R. Co.*, 63 Mich. 121; *Texas P. R'y Co. v. Lester*, 75 Tex. 56.

PAGE v. KRESS.

[80 MICHIGAN, 85.]

JUDICIAL SALES. — RESALE OF PROPERTY will not be ordered upon an offer of increase of price alone, when the property has not been sold at a sacrifice. Special circumstances, appealing to equitable considerations, must always exist, where the sale is not void, to justify an order for a resale.

JUDICIAL SALES — RESALE, WHEN ORDERED. — A resale of property will be ordered only when an interested party is not barred by laches, and there has been fraud and misconduct in the purchaser, or others connected with the sale, surprise or misapprehension, not attributable to the party's fault, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer conducting it.

JUDICIAL SALES — RESALE, WHEN ORDERED. — Where property is sold under judicial decree to the highest bidder, and the sale is fairly conducted, without fraud, after proper notice, it will require a strong case and a peculiar exigency to warrant a court in setting it aside and ordering a resale.

Dwight D. Root, for the appellants.

J. C. and C. B. Wood, for the respondent.

CHAMPLIN, C. J. At a sale, made pursuant to a decree of foreclosure of a mortgage, held on March 5, 1888, there were two bidders. One was William Stimer, bidding in his own behalf; and the other was C. B. Wood, who was bidding in behalf of Catherine Vedder. Wood bid \$885, and afterwards Stimer bid \$890; and the premises were struck off to him

and his brother, Wyman Stimer, and the commissioner's deed was duly executed to them.

Several by-standers have made affidavit that when Wood bid \$885, Stimer said: "That is enough; you can have it"; and that the commissioner then said, "Sold." But Mr. Wood, in his affidavit, does not say that the commissioner announced it as sold, but inquired for whom he was bidding, and made a memorandum of it. The commissioner makes affidavit that he did not strike off the premises to Wood, but says he made a memorandum of his bid; that Wood immediately left, and went back into the court-room. It appears that he was in attendance upon the court, and had obtained leave of absence for a few minutes to attend this sale. The commissioner says that Wood and Harry Allen, who was also present at the sale, appeared to be acting in concert, and before he announced the biddings closed, he inquired of Allen if he represented Wood, as if he did not, he wished to send for Wood; that he understood Allen to say that he represented Wood, and that he would not raise Stimer's bid, which had been made after Wood left, of \$890,—and he therefore struck off the premises to Stimer. Allen denies stating that he represented Wood, and states that he told the commissioner that he did not represent him; but he has made another affidavit, in which he states that he was then and there ready to pay the money on Wood's bid, which shows that he had some relation to the real bidder.

There was nothing which occurred at the sale which would induce a court of equity to set it aside. The premises were finally struck off to Stimer as the highest bidder. More than this, the Wood who made the bid was one of the members of the firm of J. C. and C. B. Wood, who were the solicitors for complainant, and who, on the next day after the sale to Stimer, entered the usual order *nisi* to confirm the sale. This order was entered on March 6, 1888.

On March 13, Catherine Vedder filed a petition to set aside the sale, and for a resale, saying that she would have bidden one hundred or two hundred dollars more if the premises had not been struck off in the absence of Mr. Wood. It must be remembered that in the mean time, and on the day of sale, Stimer had paid to the commissioner the amount of his bid, and it had been disbursed in accordance with the decree. To enable him to pay the purchase-money, he had mortgaged the premises purchased by him at the sale, for five hundred dol-

lars, to one Powers, and had raised the balance by mortgage or sale of his personal property. The petition of Catherine Vedder was supported by several affidavits, before referred to, with reference to what took place at the sale.

It appears that the court, on July 2, 1888, made an order that the sale on March 5, 1888, be set aside on condition that the petitioner make due service of the petition on all parties interested who had not appeared, and upon petitioner's filing a bond, with sufficient surety, that there would be bid upon the premises a sum of money not less than \$1,050 at any resale the commissioner might thereafter make,—said bond also to indemnify John Powers, mortgagee of said premises, against any damage he might sustain, and also indemnify the purchaser at the sale before then made against any damage he might sustain; and upon the filing and approval of the bond the commissioner was ordered to immediately thereafter make a resale of the premises.

Nicholas Kress petitioned the court to modify the order so as to permit a resale if a bid was offered of \$1,000, representing that he could find no one to enter into a bond conditioned to bid \$1,050, but that Harry Allen had promised to enter into a bond with him conditioned to bid \$1,000; and he annexed the affidavit of Harry Allen to that effect. The court modified the order; and thereupon the bond was filed, and a resale had, and the premises were struck off to Harry Allen for one thousand dollars. Afterwards, on a showing that the parties interested had not been notified, this sale was set aside, and notices ordered to be served, when another order, upon hearing, was had, and a resale ordered, and the premises, on such resale, were struck off again to Harry Allen for one thousand dollars, he being the only bidder at both resales. This is the same Harry Allen who was present at the first sale, and who had the money with which to pay Wood's bid, and who refused to raise Stimer's bid at that sale.

No sufficient reason is shown why the sale made on the 5th of March, which was fair and open, should be set aside to enable Mr. Allen, who was present at that sale, to raise the bid to one thousand dollars. The only showing as to value is the affidavits of Stimer and Fisk, which show that the fair value of the premises does not exceed nine hundred dollars. It cannot be urged that the price at which it was sold to Stimer was inadequate, or that it was sold at a sacrifice.

A resale will not be ordered upon an offer of increase of

price alone, when the property has not been sold at a sacrifice. The practice of the English court of chancery, which is, to open biddings before confirmation when an offer is made of an advance of ten per cent on the bid, and an indemnity to the purchaser, has not been adopted in this state. Special circumstances, appealing to equitable considerations, must always exist, where the sale is not void, to justify an order for a resale. Where a party interested has not been barred by laches, a resale will be ordered, where there has been fraud or misconduct in the purchaser, fraudulent negligence or misconduct in other persons connected with the sale, surprise or misapprehension, not attributable to the party's own fault, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer who conducts the sale. None of these elements exist in this case. The only reason for ordering a resale is, that Allen was willing to pay \$110 more than was offered at a public sale at which Allen was present, and the consequential benefit to the mortgagor, who is entitled to the surplus. If this is a sufficient reason, a resale may be ordered in nearly every case of a judicial sale, the direct tendency of which would be to destroy the confidence of bidders at such sales, and prevent bidding, thus affecting the price at which the property will sell for. When property is exposed for sale under a judicial decree, and offered to the highest bidder, and the sale is without fraud, and is fairly conducted, after proper notice, and is struck off to a third person, it will require a strong case and some peculiar exigency to warrant a court in setting it aside.

We think the order setting aside the sale made on March 5, 1888, to William Stimer and Wyman Stimer should be vacated, set aside, and held for naught, and also all subsequent orders for resale, and sales and deeds made in pursuance thereof, should be vacated, set aside, and held for naught, and it will be so decreed. William Stimer and Wyman Stimer will recover their costs of this court against Nicholas Kress and Harry Allen.

JUDICIAL SALES — RESALE. — The policy of the law is to protect judicial sales, in the absence of fraud: *Coriell v. Ham*, 4 G. Greene, 455; 61 Am. Dec. 134. As to when and under what circumstances a judicial sale may be set aside and a resale ordered, see note to *Mount v. Brown*, 69 Am. Dec. 365-374; *Campbell v. Gardner*, 11 N. J. Eq. 423; 69 Am. Dec. 598, and note 604, 605. Inadequacy of price alone is seldom, if ever, sufficient to authorize the setting aside of a sale. However, great inadequacy of price is a

circumstance of suspicion, which, taken in connection with other circumstances, may constitute a ground for setting a sale aside: *Means v. Rosevear*, 42 Kan. 377; *Davis v. Chicago D. Co.*, 129 Ill. 181; *Briant v. Jackson*, 99 Mo. 585; *Walters v. Hermann*, 99 Mo. 529; *Glide v. Dwyer*, 83 Cal. 477; *Wright v. Dick*, 116 Ind. 538. A fraudulent combination among bidders at a judicial sale to avoid competition is a ground for vacating such sale: *Frank v. Arnold*, 73 Iowa, 370. Compare *Farmers' Bank v. Quick*, 71 Mich. 534; 15 Am. St. Rep. 280.

PETERS v. CARTIER.

[80 MICHIGAN, 124.]

QUITCLAIM DEEDS.—One who holds land under a quitclaim deed is not a *bona fide* purchaser, and takes only the interest which his grantor had, especially when he has notice or ready means of knowledge as to the real condition of the title.

J. B. McMahon, for the appellant.

Dovel, Smith, and Smurthwaite, for the respondents.

GRANT, J. On May 26, 1883, one William G. Hinman, being the owner in fee of the land in dispute, and other lands, sold and conveyed them by warranty deed to complainant, Richard G. Peters. The consideration was twenty thousand dollars. The whole number of acres conveyed was 1,160. They were situated in sections 26, 27, 28, 33, 34, 35, and 36, township 20 north, range 15 west, and section 3, township 19 north, range 15 west, Mason County. They comprised all the lands he owned in that vicinity, and were known among lumbermen as the "Pierce and Hinman lands." June 1, 1883, the deed was recorded in the office of the register of deeds for Mason County. By the neglect or oversight of the register, the north half of the northeast quarter and the southwest quarter of the southeast quarter of section 34 were omitted from the record.

May 30, 1883, Peters executed a mortgage upon all the lands described in the Hinman deed, and other lands also, for fifty thousand dollars. This mortgage was recorded June 1, 1883, and the record contained a description of the land here in controversy. This mortgage contained some defects, not material to the issue in this case; and December 24, 1883, Peters and his wife executed another mortgage to correct them. This mortgage covered the same lands as the first, and was recorded January 4, 1884. After the purchase from Hinman, the lands were assessed to Peters, and the taxes paid by him and his co-complainant.

Douville knew of the sale to Peters. He was a land speculator. Having learned from the record the condition of the title as it there appeared, he wrote to Hinman, who lived in Pontiac, a letter, dated September 8, 1885, offering him ten dollars for a quitclaim deed of the whole of section 24, township 20 north, range 15 west. The letter contained this statement: "It is probably worth nothing to you, and I do not know as it will be worth anything to me."

Hinman wrote accepting the offer. Douville thereupon, on September 15, sent him a draft for ten dollars, and a deed for section 34 instead of 24. Hinman testifies that he signed the deed supposing that it was for section 24, and he assigns a good and honest reason for executing such a deed for the latter section. This deed was recorded September 22, 1885.

September 28, 1887, Douville conveyed to Cartier, by quitclaim deed, the southwest quarter of southeast quarter of section 34, the consideration being two thousand five hundred dollars. Before the deed to Cartier was made, Douville procured an abstract of the title, and delivered it to him. This showed the two mortgages above mentioned, and the quitclaim deed to Douville with a consideration of one dollar. Peters and Douville lived in Manistee; Cartier, in Ludington. Douville employed one Stronach to sell the land for him, offering him two hundred dollars to make a sale. Cartier had previously requested Stronach to be on the lookout for pine-lands for him. Stronach informed Cartier of this land, and Douville's offer to sell for two thousand five hundred dollars. Stronach was a careful timber estimator. He examined the land at the request of Cartier, and reported to him that there were six hundred and fifty thousand of pine timber, worth six dollars per thousand. When Stronach offered the land to Cartier, Cartier replied: "Is n't that the forty that Mr. Peters has a claim on?" Cartier had lived upwards of thirty years in Manistee and Ludington; was well acquainted with Peters; could communicate with him at any time by telephone; kept himself posted, to know where the pine in that region was, and who owned it; went to Manistee to see Douville about the purchase. He further testifies that his neighbors knew, substantially, what pine he owned, and he knew what pine his neighbors owned. He knew that Douville's title rested upon a quitclaim deed, with only a nominal consideration. Douville refused to warrant his title.

Complainants did not know of the mistake in the record

until after the deed to Cartier. Immediately upon learning this fact, they filed the bill to remove the cloud from their title. Decree was rendered in favor of complainants. Cartier alone appeals. Cartier's son, evidently mistrusting the validity of Douville's title, asked his father, prior to the purchase, if he thought Douville was the owner of the land. The above are the essential facts to be gathered from the record.

1. Peters was the owner in fee of this land, and can only be divested of his title by a *bona fide* purchaser without notice of such facts as were sufficient to put a prudent man upon inquiry. Hinman had no title to convey to Douville. Douville knew that Peters had purchased, and that the deed to him was worthless. The execution of the two mortgages — one only a few days after the purchase by Peters, which purchase was known to Cartier — was an assertion of title in the mortgagor. Cartier had actual knowledge of these mortgages, and this alone should have been sufficient in morals, if not in law, to have caused him to investigate the title. But aside from this, he evidently understood that this land was included in the Peters purchase. It was therefore his duty to inquire into Peters's rights before purchasing. He could have communicated with Peters personally, or by letter or telephone, in a few hours. The conclusion is irresistible that he feared the result of an investigation into the title, and preferred to take his chances of being held to be a *bona fide* purchaser without investigation. His grantor refused to give him any but a quitclaim deed, thereby exhibiting a lack of confidence in his title. All the indications surrounding the transaction would, if followed, have speedily led him to the truth. He blindly declined to pursue them. He was not, therefore, a *bona fide* purchaser. The recording laws were never intended as a shield to such transactions.

2. Under the cloak of quitclaim deeds, schemers and speculators close their eyes to honest and reasonable inquiries, and traffic in apparent imperfections in titles. The usual methods of conveying a good title — one in which the grantor has confidence — is by warranty deed. The usual method of conveying a doubtful title is by quitclaim deed. The rule is wise and wholesome which holds that those who take by quitclaim deed are not *bona fide* purchasers, and take only the interest which their grantors had. This rule is adopted in the United States supreme court, and in the courts of many of the states: *Johnson v. Williams*, 37 Kan. 179, and cases there cited. It

is therefore immaterial whether Cartier had notice or knowledge of complainants' title. He must be held to have purchased at his own risk; and Douville, having no title, conveyed none to him.

Decree is affirmed, which costs of both courts.

QUITCLAIM DEED — BONA FIDE PURCHASER. — One holding or claiming under a quitclaim deed cannot be deemed a *bona fide* purchaser: *Steele v. Sioux Valley Bank*, 79 Iowa, 339; 18 Am. St. Rep. 370, and note.

PORTER v. CHICAGO AND WEST MICHIGAN RAILWAY COMPANY.

[80 MICHIGAN, 156.]

RAILWAYS — PASSENGER ALIGHTING FROM MOVING TRAIN. — A passenger who is injured in alighting from a moving train after it has passed the station of his destination, and who attempts to alight without invitation or an announcement of the station, has the burden of proof to show negligence on the part of the railroad company; and although the accident happened from a failure of the air-brakes to respond in stopping the train, he cannot recover, if it is shown that such brakes worked perfectly at other stopping-places on the same trip, and were not out of order through any negligence of the company, and that it used proper efforts by means of hand-brakes to stop the train. Nor is the fact that when the train had stopped after the accident it was suddenly started up any evidence of negligence on the part of the company, in the absence of evidence that the sudden starting of the train had anything to do with the accident.

Smith, Nims, Hoyt, and Erwin, and M. J. Smiley, for the appellant.

Montgomery and Bundy, and George P. Wanty, for the respondent.

GRANT, J. Plaintiff recovered judgment in the court below for injuries sustained while jumping from a moving train on the defendant's road.

She purchased a ticket August 7, 1888, and took the train from Grand Rapids to a place known as the "Lake Shore Crossing," near which she resided. At this point the defendant's track crossed that of the Lake Shore and Michigan Southern. The defendant was in the habit of receiving and carrying passengers to and from this crossing, but had not erected any platform or station-house. Its trains were required to stop four hundred feet from the crossing, when passengers were

allowed to leave and board trains. The fare was ten cents, which plaintiff had paid. On nearing the station, the engineer of the train, which was a fast express, and running from forty-five to fifty miles per hour, whistled at the usual and proper distance, and applied the air-brakes. These brakes failed to respond, and he immediately whistled for hand-brakes. The train hands, including the conductor, brakeman, and baggage-man, immediately proceeded to set them. The engineer, upon passing the half-mile board, and seeing that the train was not under control, again whistled for brakes, and reversed his engine. He did not succeed in stopping the train before reaching the crossing. The air-brakes were properly tested before leaving Grand Rapids, and were found to be in good order. They also worked perfectly at other stopping-places. They failed to work at the crossing because, in some way entirely unexplained, the air-cock between the second and third cars had been turned, shutting off the air. This made it impossible to stop the train at the usual place.

Plaintiff had been to the city upon a visit, and was returning home. She heard the whistle for the crossing. As the train commenced to slow up, she arose from her seat, and went to the door. As the train approached the usual stopping-place, she saw that it was going too rapidly for her to alight. As it gradually grew slower, she went out on the platform, to be ready to alight when it stopped. She then stepped down upon the lower step. When 166 feet from the crossing, with a small valise and umbrella in one hand, holding on to the rail with the other, and facing towards the engine, she jumped from the step to the ground, — a distance of about two feet. She fell, and in some way her feet were struck by some portion of the train, and seriously injured. She testified that the speed of the train had gradually slackened; that at the time she jumped, it was running very slowly, having the appearance of just coming to a halt; that she then attempted to alight because it seemed to her to be her only opportunity for doing so. She stood on the front steps of the third car from the rear, next to the smoker. She does not testify how her feet happened to come in contact with the moving train; for, upon falling, she says she momentarily lost consciousness, but recovered it again before the train had passed.

One witness stood on the steps between the smoker and the baggage-car, and, knowing that something unusual had happened, as the train had passed the usual stopping-place, was

leaning outwards, and looking to the rear. He saw plaintiff jump, with her valise and umbrella in her hand. He says that when she struck she wheeled around, and her feet struck the hind truck as they went by. This is the only testimony as to the manner of the injury, and is undoubtedly correct. The trucks did not pass over her feet, for her toes were not cut to pieces, crushed, or jammed. Some of the bones between the toes and ankle of the right foot were broken, and the flesh badly torn. The left foot was badly contused, but no bones were broken. Witnesses vary in their estimates of the speed of the train, from two to fifteen miles per hour. It is apparent, from the manner in which the accident occurred after plaintiff jumped, and the injury inflicted, that the speed of the train was considerable. Plaintiff was twenty-three years old, a graduate of the normal school, a school-teacher, accustomed to travel, and had repeatedly traveled over this part of the defendant's road.

Three grounds of negligence are alleged: 1. The defendant negligently failed to bring its train to a full stop at the usual place. 2. The defendant's servants furnished plaintiff no assistance in alighting from the train. 3. The defendant negligently started the train up, with sudden violence, while plaintiff was attempting to alight.

These are all combined in each count of the declaration, and together were undoubtedly intended to constitute the negligence against the defendant. We will, however, consider them separately.

1. No negligence is shown by the fact that the train ran past the usual stopping-place. The train was equipped with the usual air-brakes required by law. They were in good condition when the train started out. The turning of the air-cock was the sole cause of the inability of the engineer to control the train. How it became turned is wholly unexplained. The mere fact that it was turned is not of itself evidence of negligence. If it was turned by an accident which ordinary prudence could not have foreseen and prevented, or if it was designedly turned by some one not in defendant's employ, the defendant cannot be held liable. The burden of proof was upon the plaintiff to show that it was turned through the negligence of the defendant. This she has failed to do.

2. All the train-men were at the time at their posts of duty, attempting to stop the train, in obedience to the requirements of law. The station had not been announced, nor had the

train stopped. The plaintiff had not been invited to alight. It is fair to presume that if the train-men had been near her they would have prevented her alighting, instead of assisting her to alight. It would certainly have been their duty to use all proper means for that purpose while the train was in motion. Under these circumstances, this allegation of negligence falls.

3. There is some evidence tending to show that the train, after it had slowed down, suddenly started up. But one cannot read the record without being convinced that the train gradually slowed down, till it came to a full stop when across the track of the other road. Be that as it may, the record fails to show that the sudden starting of the train had anything to do with the accident to plaintiff. No witness testifies that it started up when she was in the act of alighting. Her own testimony is conclusive that it had not. Under the record, there was no proof of negligence, and the circuit judge should have so instructed the jury. We express no opinion upon the question of contributory negligence.

Judgment reversed, and new trial ordered.

NEGLIGENCE — PASSENGER JUMPING FROM A MOVING TRAIN. — While a train must be stopped at the station to which the company contracted to carry a passenger, the fact that the train is about to pass the station without stopping does not justify a passenger in jumping from the train while it is moving: *Walker v. Vicksburg etc. R. R. Co.*, 41 La. Ann. 795; 17 Am. St. Rep. 417, and extended note 422-429, discussing the question of contributory negligence upon the part of one alighting from a moving train. See also *Weber v. Kansas City C. Ry Co.*, 100 Mo. 194; 18 Am. St. Rep. 541; *Pennsylvania Co. v. Marion*, 123 Ind. 415; 18 Am. St. Rep. 330.

KELLEY v. DETROIT, LANSING, AND NORTHERN RAILROAD COMPANY.

[80 MICHIGAN, 237.]

EVIDENCE — HEARSAY. — In an action to recover for personal injuries received in attempting to alight from a railroad train, statements made to a witness in the morning by the injured party, in response to inquiries as to how he had rested, are narrations of past transactions, hearsay, and inadmissible as evidence of the extent of suffering of the injured party.

WITNESS — OPINION AS EVIDENCE OF NEGLIGENCE. — In an action to recover for personal injuries received from attempting to alight from a railroad train, the opinion of a witness, as to whether the accident happened by reason of defendant's negligence or of plaintiff's inattention, is incompetent and inadmissible.

PRACTICE. — WHERE PLAINTIFF'S WITNESS has been allowed to answer a question of doubtful competency, it is error to refuse to allow defendant's witness to answer practically the same question.

C. B. Lathrop, and Smith and Stevens, for the appellant.

Rutherford and Houseman, for the respondent.

CAHILL, J. The plaintiff sued to recover damages for an injury to her left ankle, caused by a fall while alighting from defendant's train at Lakeview station, October 6, 1888.

The declaration is not set out in the printed record, and no point is made upon its sufficiency. It alleges negligence on the part of defendant in failing to provide suitable and safe attendance and appliances for the safety of passengers in alighting from defendant's coach, and charges that defendant stopped its train in the darkness, where no lights were burning, and placed a box-step so carelessly, "the top or covering projecting over said box or step in such a manner that, when the plaintiff stepped from said car into the darkness, she stepped upon the projecting edge of said box, by means of which it was overthrown," and plaintiff was injured.

Defective construction of the box-step, improperly placing the same, lack of proper assistance by defendant's employees, and lack of artificial light are alleged in the second count.

The plaintiff recovered judgment for one thousand dollars, and the defendant brings error.

Four errors are assigned on the admission or exclusion of testimony. Upon the trial the plaintiff called as a witness Abram Kelley, who testified as follows: "The plaintiff is my niece. She visited me at Lakeview about a year ago, arriving there on October 6th. I was at the defendant's depot to meet her. When the train arrived, I walked down to assist her. She stepped down on the box-step, and fell to the sidewalk. My impression is, that the train was a little late. We stayed at the depot quite a spell before it came. There were freight-cars standing on the side-track, about opposite where the car-step was. There was no light outside of the car, nor any about the depot, that reflected on the steps. It was not really awful dark, and it was not very light. It was between light and dark; sort of twilight. It was a little too dark to distinguish anything at the station, between those two trains of cars where she alighted. She was taken to my house. Her ankle was swollen considerably. She was at my house four weeks, and had to go on crutches while there."

Plaintiff's counsel then asked witness the following question: "Tell the jury the extent of her suffering, so far as it came under your observation." Witness said: "I know that, every morning, I asked her how she rested."

Whereupon counsel for defendant objected to the witness testifying to statements made by the plaintiff in answer to such questions of the witness, as being hearsay and incompetent. The objection was overruled, and defendant's counsel excepted. The witness continued: "She said she did n't rest well for quite a good many nights; that she would have to be up in the night, — that is, we had a bowl of water set so she could bathe her ankle."

Upon the admission of this evidence the first error is assigned. Defendant's counsel do not question the rule that expressions or exclamations of present bodily pain are competent evidence, but it is claimed that this evidence does not come within the rule, because the statements did not indicate present bodily feeling, but were narrations of past transactions, and were made in answer to questions put to her by the witness. The admission of this testimony was error. The witness was asked to tell the jury the extent of her suffering, so far as it came under his observation. This was a proper inquiry, and it could have been properly answered by any testimony which tended to show that the plaintiff was wakeful, restless, or showed other indications of being in pain. But we do not think it was within the rule for the witness to testify to what the plaintiff said to him about her sleeplessness, in response to his inquiries. Such statements made in the morning after the sleepless nights were narrations of past transactions, and the testimony received was hearsay: *Johnson v. McKee*, 27 Mich. 472; *Grand Rapids etc. R. R. Co. v. Huntley*, 38 Mich. 543; 31 Am. Rep. 321; *Mayo v. Wright*, 63 Mich. 40.

The second error is assigned upon the refusal of the circuit judge to allow an answer to the following question asked of the witness Gilleo, on cross-examination by defendant's counsel: "At the time of the accident, did it occur to you that the accident happened by reason of the darkness? Whether it occurred to your mind that the accident happened by reason of the darkness or by reason of the inattention of Miss Kelley to a step being there?"

We think this testimony was properly excluded. The questions called for the opinion of the witnesses upon a question

which the jury were to pass upon, viz., whether the accident happened by reason of the defendant's negligence or by reason of the plaintiff's inattention. This witness had testified that he was at the depot on the night of the accident, and saw the plaintiff descending from the car-steps to the box, and saw her fall. Any opinion that he could have must have been formed at the time, and we do not think it was competent for him to give his opinion. He was allowed to state the facts about the transaction fully. From these facts, and not from his opinion based upon them, the jury should find their verdict: *Evans v. People*, 12 Mich. 34; *Lemon v. Chicago etc. R'y Co.*, 59 Mich. 618; *Anderson v. Thunder B. R. Boom Co.*, 61 Mich. 489; *Harris v. Clinton Tp.*, 64 Mich. 447; 8 Am. St. Rep. 842; *Melzer v. Peninsular Car Co.*, 76 Mich. 94.

The third and fourth assignments of error are based upon the refusal of the circuit judge to allow defendant's counsel to ask Merritt Staples, a witness called by the defense, the following questions: "With reference to the light, — the amount of light at that time, — will you state whether in your judgment a person coming down the car-steps, whether it was light enough for them, if they had looked, to see a box of that kind? Will you state whether or not a person coming down the car-steps, if they had looked, they could have seen the box or not?"

We think the exclusion of the first question, at least, was error. Plaintiff's counsel had been permitted to ask his witness Gilleo the following question: "Q. As to whether or not a person alighting from a car would be able, in your judgment, to distinguish a small object sitting down on the ground as well as if it was daylight? A. No, sir."

This was practically the same question which, under his objection, the court refused to allow defendant's counsel to ask his witness. Whether either of these questions was strictly competent, even under the very liberal rules permitted by this court in *Evans v. People*, 12 Mich. 35, *People v. Detroit Post and Tribune Co.*, 54 Mich. 465, *Laughlin v. Street Railway Co.*, 62 Mich. 226, *Kelley v. Richardson*, 69 Mich. 436, may admit of some question, but it would be very unfair to establish one rule for the plaintiff and another for the defendant.

For the errors pointed out, the judgment must be reversed, and a new trial granted, with costs of this court.

HEARSAY EVIDENCE. — The rule is, that hearsay testimony is not admissible: *Lynch v. Postlethwaite*, 7 Mart. (La.) 69; 12 Am. Dec. 495; *Woods v. Montevallio etc. Co.*, 84 Ala. 560; 5 Am. St. Rep. 393; *Rogers v. Railroad Co.*, 31 S. C. 379; *Beard v. First Nat. Bank*, 41 Minn. 153; *Carr v. McCarthy*, 70 Mich. 258; *Warren v. Fredericks*, 76 Tex. 647; *Howard v. Russell*, 75 Tex. 171; *Fengar v. Brown*, 57 Conn. 60; *Ross v. Goodwin*, 83 Ala. 391; *Howard v. Savannah etc. R'y Co.*, 84 Ga. 711; *Central R. R. Co. v. Kent*, 84 Ga. 351; *Egan v. Grece*, 79 Mich. 629; *Lane v. Washington L. Ins. Co.*, 46 N. J. Eq. 316; *Doyle v. Rector etc.*, 118 N. Y. 678; *Nixon v. McKinney*, 105 N. C. 23; *Haase v. Oregon R'y & Nav. Co.*, 19 Or. 354; *Southern P. R'y Co. v. Maddox*, 75 Tex. 300; *Myers v. Trice*, 86 Va. 835; *State v. Evans*, 33 W. Va. 417. In *Wise v. Newatney*, 26 Neb. 89, where a witness was called to testify as to words spoken to him in a language which he did not understand, and which were interpreted to him by an interpreter in whom he confided, it was decided that such testimony was not hearsay.

Narrations of past occurrences as to the manner in which a party was injured are not admissible in evidence: *Dundas v. City of Lansing*, 75 Mich. 499; 13 Am. St. Rep. 457; *Savannah etc. R'y Co. v. Holland*, 82 Ga. 257; 14 Am. St. Rep. 158; *Chicago etc. R'y Co. v. Becker*, 128 Ill. 545; 15 Am. St. Rep. 144; note to *Leahey v. Cass Ave. etc. R'y Co.*, 10 Am. St. Rep. 457.

OPINION EVIDENCE. — Statements made by by-standers an hour after an accident happened as to how, in their opinion, the accident was caused, are inadmissible: *Missouri P. R'y Co. v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758. Opinions are never admissible when the facts upon which the witness founded his opinions may be ascertained, and made intelligible to the court and jury: *Otis v. Thom*, 23 Ala. 469; 58 Am. Dec. 303, and note; *Louisville etc. R'y Co. v. Railway Co.*, 67 Miss. 399; *McCarragher v. Rogers*, 120 N. Y. 526.

KING v. BATES.

[80 MICHIGAN, 367.]

JUSTICES' JUDGMENTS — JURISDICTION — SERVICE OF PROCESS. — Where a justice's docket shows that the summons was served by a private person, but does not state that any inquiry was made by the justice as to the competency of the person designated to serve it, nor does any indorsement authorizing such service appear thereon, the justice acquired no jurisdiction, and his judgment is null and void, nor can he be subsequently permitted to supply these omissions by his oral testimony, and to make the necessary indorsement upon the docket, so as to validate the judgment.

JURISDICTION. — **PROOF OF SERVICE OF PROCESS** to give jurisdiction cannot rest in parol.

JUSTICES' JUDGMENTS — EVIDENCE OF JURISDICTION. — Justices' courts are courts of limited jurisdiction, and when a case has been tried therein and the record thereof entered upon the docket, the justice's control over it has ended, except to issue execution; and he cannot thereafter show necessary jurisdictional facts by his oral testimony, even under order of a superior court.

FitzGerald and Barry, and F. A. Stace, for the appellant.

John M. Mathewson, for the respondent.

GRANT, J. This suit was commenced by summons March 14, 1889, before Milton M. Perry, a justice of the peace. Upon the return day defendant Bates, who had been personally served with process, appeared. Coppens did not appear, not having been served. Plaintiff declared on the common counts in *assumpsit*, and on a judgment rendered by Milton M. Perry, a justice of the peace, March 16, 1883. Defendant Bates demanded a bill of particulars. Plaintiff stated that this judgment was his bill of particulars.

Upon the trial the plaintiff offered in evidence the docket entry of a judgment rendered March 16, 1883, in favor of plaintiff, King, and against the defendants, Bates and Coppens. Defendants objected to its admission, on the ground that the justice obtained no jurisdiction to render the judgment, because the summons was not served by any constable or officer of the law, and there was no proof in the record that it was served by any competent person, in accordance with Howell's Statutes, section 6827. The justice overruled the objection, on the ground that the judgment could not be attacked collaterally. Neither Bates nor Coppens appeared in the first suit. Defendant Bates thereupon appealed this suit to the circuit court.

Upon the trial in the circuit, the docket entry of the justice and the files in the case tried in 1883 were offered in evidence. The summons was not served by an officer. The justice placed the summons in the hands of a private person for service, but did not indorse any written authority to such person upon the summons; nor did his docket contain any statement that he had made any inquiry to determine the competency of the person so designated to make the service. The person so designated returned under oath that he had personally served the summons upon Bates. The learned circuit judge permitted Milton M. Perry, the justice, to testify that he did make inquiry into the competency of the person designated to make the service, and that he was a competent person; and also permitted said justice to take the summons issued in said cause, and to indorse upon it the following:—

“On request of within plaintiff, and deeming it expedient so to do, I did, on March 8, 1883, appoint and empower Henry W. Booth to execute the within process, he being a competent and proper person to execute the same, being of lawful age and not a party to the suit, and nowise interested in the event thereof. The above is indorsed hereon the eleventh day of

January, 1890, by permission of the circuit court of the county of Kent, and in open court, by way of amendment.

"Dated January 11, 1890.

MILTON M. PERRY,

"Justice of the Peace."

The court also permitted the justice to amend his docket by adding to it a similar statement to the above.

This court has too often decided that, under a record such as this, before the amendments were made, justices of the peace obtain no jurisdiction, and that their judgments are null and void, to render any discussion or citation of authorities necessary.

It is equally well settled that proof of service of process, to give the courts jurisdiction, cannot rest in parol. Courts have liberally construed the statute of amendments in matters of form, where it is clear that no injustice can be done; but amendments without which the court obtains no jurisdiction to try the case can only be made by the court which tried the cause, and upon notice to the opposite party. Upon such proposed amendments, the opposite party is entitled to make a showing.

The amendment made by the justice in this case, by order of the court, cannot be defended upon authority or reason. When the case at bar was tried before the justice, plaintiff did not ask to amend, although the case was being tried before the same justice who tried the first suit. Justices' courts are courts of limited jurisdiction. They have no stated terms. When the case has been tried, and the record thereof entered upon the justice's docket, his control over it has ended, except to issue execution. In a case similar to this, the justice sought to correct the error in his return to a writ of *certiorari* by certifying the existence of jurisdictional facts; but this court held that this did not cure the error: *Noyes v. Hillier*, 65 Mich. 636. This court also held that after the justice had made his return in a criminal case, he could not procure the signatures of the witnesses who had failed to sign their depositions: *People v. Chapman*, 62 Mich. 280; 4 Am. St. Rep. 857. Nor can a justice amend his record after judgment by changing the Christian name of one of the parties, although both parties consented: *Foster v. Alden*, 21 Mich. 507. See also *People v. Delaware Common Pleas*, 18 Wend. 558; *Ramsey v. Cole*, 84 Ga. 147.

The judgment of the court below is reversed, with costs, and a new trial ordered.

JURISDICTION, EVIDENCE ALIUNDE TO SHOW. — The jurisdiction of courts of record is always presumed, and therefore, as to them, the question of the admissibility of evidence *aliunde* to affirmatively establish jurisdiction rarely arises. As to courts of inferior jurisdiction or limited powers, and not of record, an entirely different rule prevails. They must not only act within the scope of their jurisdiction, but it must appear from the face of their proceedings that they so acted; otherwise their judgments may be impeached collaterally. No presumptions are indulged in favor of their jurisdiction, and want of it may be shown by evidence *aliunde*. General expressions are found in the books which seem to indicate, in effect, that unless the jurisdiction of such courts affirmatively appears from the record, the judgment will be void. If this rule is to be taken as absolutely correct, there would seem to be no question of introducing evidence *aliunde* to either support or to contradict it. We apprehend, however, that this rule is only true to the extent that such jurisdictional facts must affirmatively appear from the record, in order to show that the court had jurisdiction, as are required to so appear by the statute; and that as to all others, although the record is silent on the subject or defective in its showings, proper evidence *aliunde*, tending to show that the court had actual jurisdiction, is admissible; and this is the doctrine established by the weight of authority as shown by those cases wherein the question has been directly adjudicated.

Thus in *Liss v. Wilcozen*, 2 Col. 85-88: "The question remains, however, whether the jurisdiction of the justice must appear affirmatively by his record, or whether, when nothing there appears to show the matter adjudicated upon, the omission may be supplemented by proofs *aliunde*; and upon this question a majority of the court are of the opinion that when the docket is silent the jurisdiction of the justice may be established by proof as to what in truth was the controversy litigated before him. It follows from this that the transcript offered in evidence, though not of itself sufficient to establish the jurisdiction of the justice or the validity of the judgment therein set forth, was admissible, for it rested in the discretion of the court below to require proof of the jurisdiction in the first instance, or after the transcript of judgment had been received. In the admission of this evidence, therefore, there was no error." So in the case of *Behymer v. Nordloh*, 12 Col. 352, it was contended that the statute was mandatory in requiring the justice to record in his docket "the amount and nature of the debt sued for," and that its omission was a fatal jurisdictional defect; but the court decided that the omission of the justice to record the aforesaid matter in his docket might be supplemented by proofs *aliunde*.

Again, it is determined in *Jolley v. Foltz*, 34 Cal. 321, that the fact of the residence of defendant in a particular township is jurisdictional; but where the statute does not require its existence to be recorded in the justice's docket, or to be made to appear in any written evidence of the proceedings, or in what manner such facts as do not appear of record, or are not required to so appear, shall be made to appear or be proved, parol evidence that such defendant, at the time that the action was commenced, resided in the township where the action was begun, is admissible. Where jurisdictional facts do not appear of record, their existence may be shown by proof *aliunde*. Thus where it appears that a special meeting of the board of police was held after the notice required by law had been given, such meeting is shown to have been legally held, notwithstanding the record does not show that previous notice was given: *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 508. It is not necessary that the record of proceedings of a court of limited and

inferior jurisdiction should show affirmatively on its face that the court had jurisdiction. That may be shown by extrinsic evidence; and so where, upon the introduction of the record in evidence, it is objected to, not upon the ground that jurisdiction was not established by proper proof, but because the proceedings shown by the record are void, the objection is not sufficient to raise the question of jurisdiction on appeal: *Van Deusen v. Sweet*, 51 N. Y. 378. So where, on appeal from the orphans' court, the record is silent as to the grant of letters testamentary to the executors under a will, the probate of the will, wherein were named as executors the persons who acted as such, the filing and approval of their bond, and the exhibition to and passage by the court of their executors' accounts, in one of which is the specific allowance of the fee paid to the register for issuing letters testamentary, is abundant proof that they were granted to the executors.

On the other hand, it has been decided that evidence extrinsic to the judgment record cannot supply facts requisite to jurisdiction: *Anderson v. Binford*, 11 Heisk. 310; and that the contents of a justice's record are to be proved by an authenticated copy of it, and his certificate, alleging what facts appear by the record, cannot be received in proof of jurisdictional facts: *English v. Sprague*, 33 Me. 440.

KINGMAN v. SINCLAIR.

[80 MICHIGAN, 427.]

MORTGAGES—EQUITABLE DISCHARGE OF OUTLAWED MORTGAGE.—Equity will compel the discharge from the record of a mortgage against which the statute of limitations has run, without requiring proof of the actual payment of the debt.

Ward and Ward, for the appellant.

Charles E. Soule, for the respondent.

CAHILL, J. This case involves the question whether a court of equity will compel the discharge from the record of a mortgage against which the statute of limitations has run, without requiring proof of the actual payment of the debt.

The facts are as follows: In 1863 complainant's husband bought an eighty-acre farm in Ottawa County, and moved upon it with his family. Before his death he conveyed it to complainant, who continued to reside on it down to 1885, a period of twenty-two years. She leased it to a tenant for two years longer, and so was in the unquestioned possession and ownership of the property for twenty-four years before filing her bill. Desiring to sell the property, complainant, in 1887, procured an abstract of the title, and for the first time learned that there was an undischarged mortgage against the farm, given March 11, 1854, by Franklin Nichols, who at that time owned the equitable title to the land by virtue of a certificate

of purchase issued by the state of Michigan to him. The mortgage was given to Benjamin Allyn for \$113.66, due one year after date, with interest at ten per cent. No payment was ever indorsed on this mortgage, or on the accompanying note.

Benjamin Allyn, the mortgagee, died testate in 1859, leaving his estate to defendant, Mrs. Sinclair, who was also executrix of his will. In September, 1887, the complainant applied to Mrs. Sinclair for a discharge of this mortgage, claiming that it was a cloud upon her title, and prevented her making a sale of it. She offered to pay the expenses of making a discharge, but Mrs. Sinclair refused to discharge the mortgage without payment. In June, 1888, complainant filed her bill in the Ottawa circuit court, in chancery, to compel the discharge of this mortgage. The bill sets up the foregoing facts, and prays that defendant, as executrix, "may be required by the order and decree of this court to execute and deliver to complainant, for record, a discharge of said mortgage, thereby clearing the same from the record of the title to her said farm, and that, until such discharge shall be executed and delivered, a certified copy of the decree of this court may be recorded and stand in lieu thereof, and that complainant may recover her costs."

The defendant appeared, and answered, admitting the giving of the mortgage; that Benjamin Allyn was dead; that defendant was executrix; and that, so far as her knowledge of the matter extends, she knows of no payments on said mortgage, or suits or proceedings to foreclose the same. She admitted that she refused to discharge the mortgage without compensation, because she knew said mortgage had not been paid; claims that the bill is inconsistent and contradictory in stating that the mortgage was both paid and outlawed; and says that if complainant would do justice and equity in the premises, she would pay said mortgage; denies that complainant is entitled to any relief; and prays the same advantage of her answer as if she had demurred.

Proofs were taken in open court before Hon. Dan J. Arnold, circuit judge. No evidence was offered of actual payment of the mortgage, or any part of it, principal or interest, nor was there any evidence that any suit or proceeding had at any time been commenced to foreclose the same, and a decree was rendered in favor of the complainant. Defendant appealed.

The claim made by defendant is, that when complainant seeks the aid of a court of equity, she must be willing and

ready to do equity; that the moral obligation to pay her debt remains as strong after the running of the statute of limitations as before, and calls upon her to pay the debt; that equity will not and ought not to compel the discharge of this mortgage without actual payment. But this doctrine, if correct, applies only when complainant personally owes the debt which the mortgage was given to secure: *Booth v. Hoskins*, 75 Cal. 271. This mortgage was given by some former owner of an equitable interest, and complainant says she never knew of it until 1887. She could not have bought the land subject to it in such a way as to make her personally bound to pay it legally or equitably. It was once a lien upon her land; it was never a claim against her. What she seeks is to have this lien, which once existed in fact, and still exists of record, as a cloud on her title, removed.

It appears from the testimony that this mortgage is not a mere fancied cloud upon the complainant's title; that she has sold the land, but that the purchaser insisted upon keeping back a part of the purchase-money until this apparent mortgage is released.

If the defendant, in her capacity as executrix, did not feel authorized to discharge this mortgage, and had based her defense wholly upon that position, disclaiming any right to or interest in the mortgage so far as it constituted a lien upon the complainant's land, the court could very properly have required the complainant to prosecute the suit at her own expense: *Howell's Statutes*, sec. 8963. But this the defendant did not do. She defended upon the merits, claiming that the complainant was not entitled to the relief prayed for, and we think the decree below should be affirmed, with costs.

MORTGAGES — STATUTE OF LIMITATIONS. — The right to enforce a lien of a mortgage is barred by the statute of limitations after the expiration of the statutory period: *Cunningham v. Hawkins*, 24 Cal. 403; 85 Am. Dec. 73.

PRESUMPTION OF PAYMENT AFTER LAPSE OF TIME AS APPLICABLE TO MORTGAGES: See note to *Alston v. Hawkins*, 18 Am. St. Rep. 881, 882.

MUELLER v. PROVO.

[80 MICHIGAN, 475.]

BILL OF SALE AS SECURITY — CONSIDERATION — RIGHTS OF CREDITORS. —

Where a bill of sale in the nature of a chattel mortgage is given for a named consideration, and nothing appears upon its face to indicate that it was intended to secure any other or greater sum, the creditors of the mortgagor are required to treat the instrument as valid only to the amount specified.

REPLEVIN. — TO ASSERT THAT LIEN OF MORTGAGE STILL EXISTS after payment of the mortgage debt is a fraud on the mortgagor's execution creditors, and they may levy upon the property without making the levying officer liable in replevin for the return of the property to the mortgagee.

REPLEVIN. — APPRAISED VALUE OF PROPERTY taken in replevin is not conclusive, but is accepted only in the absence of evidence more satisfactory. Still, if such valuation is not contested, it will be deemed to be satisfactory.

REPLEVIN — WAIVER OF RETURN OF PROPERTY. —In replevin against an officer for property seized under execution, he may waive a return of the property, and take judgment for the amount of his lien already established by the first judgment; and the acceptance of a verdict for the value of the lien, and causing judgment to be entered thereon, is sufficient evidence of his election to waive a return.

F. D. Mead and E. C. Chapin, for the appellants.

Ball and Hanscom, for the respondent.

CAHILL, J. The plaintiffs in this suit, who were doing business as timber merchants in Chicago, brought an action of replevin in the circuit court for Delta County, on June 1, 1888, to recover a quantity of cedar ties, posts, poles, and logs.

The defendant was the sheriff of Delta County, and had possession of the cedar under two executions against Frederick M. Olmsted, issued upon judgments rendered in the Delta circuit; one in favor of William J. Quan & Co. for \$1,772.33 damages, and \$106.05 costs; and one in favor of Gray, Kingman, and Collins for \$2,009.40, and \$20 costs. The executions were issued May 25, 1888, and levied upon the property in question May 31st, and the main question in the case is, whether the defendant had a right to levy upon this property, and realize from it the amount of these executions. The facts necessary to be stated are as follows: —

On October 26, 1886, the plaintiffs made an agreement with Olmsted, the execution debtor, by which he was to get out and deliver to the plaintiffs at Milwaukee, Racine, or Chicago a quantity of cedar ties and posts, for which they were to pay him an agreed price. The plaintiffs were to make advances to Olmsted in money and supplies during the progress of the

work, and Olmsted agreed to give plaintiffs a bill of sale of the cedar as fast as it should be banked, if the plaintiffs should ask it. Olmsted also agreed to give to the plaintiffs a mortgage on all his goods, including those he had on hand at the date of making the agreement and those he was then shipping down, as further security for the advances made to him. Work under this arrangement was begun in the fall of 1886, and prosecuted through the winter and spring of 1887.

On July 20, 1887, Olmsted owed the plaintiffs a balance of \$7,751.50, and on that day Mr. Christy, of the plaintiffs' firm, went to Escanaba, and took a bill of sale of the cedar then on hand. The consideration named in this bill of sale was three thousand dollars, and we are satisfied that it was intended as security, and was not intended to pass the title to the cedar. On the same day, Olmsted executed to the plaintiffs a chattel mortgage, covering the property in two supply stores, certain teams, wagons, etc., as additional security for the advances so made to him by the plaintiffs. The chattel mortgage is not set out in the record, and we are not informed as to the exact amount which it secured, nor as to its terms and conditions. It is stated generally that it was given as additional security. Olmsted, who was called by the plaintiffs, testified that the property covered by the chattel mortgage was worth about four thousand six hundred dollars. At the time the bill of sale was given, the cedar was in different townships in Delta County, and had not been run down the streams. The exact amount of it does not appear to have been known to either Olmsted or the plaintiffs.

In September following, Olmsted began operations again, and prosecuted them through October, and until about November 25th. During this time he had gotten out a considerable quantity of cedar, but the exact amount of this does not appear. During the summer of 1887, and after the bill of sale was given, he shipped to the plaintiffs, at Chicago, cedar to the amount of three thousand dollars. This was testified to by Olmsted, and not disputed. On November 25th, Olmsted made a new contract with the plaintiffs to work for them by the month. The plaintiffs were to furnish money and supplies as needed, as before, and Olmsted was to get out and deliver cedar of the same general description and quality as before. Under this arrangement the plaintiffs advanced to him \$6,146.25, and Olmsted got out a large quantity of cedar ties and posts, the exact amount of which does not appear.

From the facts so far stated it will appear that there were three classes of cedar gotten out by Olmsted: 1. That gotten out prior to July 20, 1887, and on which he gave plaintiffs a bill of sale; 2. That gotten out between July 20 and November 25, 1887, which, under the contract of October 26, 1886, clearly belonged to Olmsted, and on which the plaintiffs had no lien; 3. That gotten out after November 25, 1887, which belonged to the plaintiffs.

That gotten out prior to November 25th is called in the record the "old cedar," and that gotten out after that date the "new cedar." When the execution levies were made, the old and the new cedar was all mixed up. It was mixed up in the woods before it came down in the river, and it was mixed up in the river. At the time of the levy it was lying in the booms at the mouth of the Rapid River, all jammed together. It was all marked alike "F. O.," and there was no way to distinguish the old from the new cedar. The sheriff levied upon all of it. Before beginning this suit, Mr. F. D. Mead, as attorney for the plaintiffs, demanded all this property of the sheriff, who refused to deliver it. This action was then brought.

The bill of exceptions contains all the testimony. It does not appear that the plaintiffs attempted to make a clear statement of their account with Olmsted upon the trial. What information is found in the record was drawn out of Mr. Henry A. Christy, the only one of the plaintiffs who was sworn, by a rigid cross-examination.

The jury rendered a special verdict, in substance as follows: 1. That the defendant did not unlawfully detain the property; 2. That the bill of sale given by Olmsted to the plaintiffs, under which they claimed the right to the possession of the property, was fully satisfied and paid to the plaintiffs before the commencement of this suit; 3. That so much of the property replevied as was manufactured and gotten out by Olmsted prior to November 25, 1887, was of the value of \$4,057.51, and that the defendant had a special property in the same to the amount of \$4,057.51 by virtue of his writs of execution.

The defendant having waived a return of the property, a judgment was rendered allowing him to recover against the plaintiffs the sum of \$4,057.51, that being the amount of his special property in the goods and chattels manufactured and gotten out previous to November 25, 1887.

This judgment is brought to this court by the plaintiffs by

writ of error, and the following points are made against its validity:—

1. It is alleged that the circuit judge erred in instructing the jury that the bill of sale given July 20, 1887, was to secure an indebtedness of three thousand dollars, and it is claimed that there was no testimony in the case upon which to base such a charge; that the undisputed testimony of Mr. Christy showed that the bill of sale was given to secure advances made under the contract of October 26, 1886, amounting, at the time the bill of sale was given, to over seven thousand dollars. This view is based upon the idea that the consideration named in the bill of sale is not conclusive, but that the plaintiffs were at liberty to show the actual demand which the instrument was intended to secure. This would be true if the instrument itself showed that it was intended to secure a larger amount than that named as the consideration; but this rule can only apply to those cases where a discrepancy appears upon the face of the paper between the consideration mentioned at the commencement and the debt described in the later conditions of the instrument. It is possible that as between the plaintiffs and Olmsted the bill of sale might have been construed as security for the entire debt due from Olmsted to them; but where, as in this case, the bill of sale is given for a named consideration, and nothing appears upon its face to indicate that it was intended to secure any other or greater sum, the creditors of the mortgagor are entitled to treat the instrument as valid only to the amount specified: Jones on Chattel Mortgages, sec. 79; Jones on Mortgages, sec. 357.

2. It is claimed that the court erred in instructing the jury that the defendant had a right to levy upon the property in question. The instruction of the court was as follows: "When the sheriff takes property that is mortgaged, the law says that he has the right to take it and sell it, and sell the interest which the mortgagor [which would be Olmsted in this case] has. He sells it subject to the mortgagee's rights; . . . so that, so far as the property that was covered by the bill of sale is concerned, the defendant, Provo, the sheriff, had a right to take and hold it. . . . Now, assuming that mortgage was valid, — not tainted with fraud, — then I told you that the sheriff had a right to levy upon it, and hold possession of it, and that that replevin could not be maintained under those circumstances."

There was no error in this: Howell's Statutes, sec. 7682. It is claimed that this instruction ignored the plaintiffs' rights,—1. Under their bill of sale, to the cedar cut before July 20, 1887; 2. To their right to the cedar cut after November 25, 1887, as owners of it.

Neither of these positions is correct. Under the statute just cited, the sheriff had an undoubted right to levy upon the cedar cut before November 25th, even granting that the plaintiffs' mortgage was in force; but the verdict of the jury shows conclusively that the plaintiffs' mortgage was not in force, but had been paid; and, under those circumstances, for the plaintiffs to assert that the mortgage was in force, and unpaid, was fraudulent as against the execution creditors of Olmsted.

As to the property gotten out after November 25, 1887, the court instructed the jury that the plaintiffs were entitled to recover that. It is claimed that the verdict of the jury ignored this instruction. This we do not find to be the fact. The effect of the verdict was to give the plaintiffs all of the property replevied, which was appraised at \$10,123, subject only to the payment of the defendant's lien, amounting to \$4,057.51. The balance so in their hands would amount to \$6,065.49. They had before that received, in cedar shipped prior to January 1, 1888, \$11,232.59, making a total of \$17,298.08, exclusive of what may have been realized by them from the chattel mortgage, of which no account is given. We have seen that Olmsted valued the property covered by the chattel mortgage at four thousand six hundred dollars. It is difficult to ascertain from this record the exact amount of plaintiffs' advances to Olmsted, but it appears that the balance due them January 1, 1888, was \$6,146.28. If to this we add the amount of Olmsted's credits, \$11,232.59, we have \$17,378.87 as the amount which appeared on the plaintiffs' books against Olmsted January 1, 1888. These figures show that there was due the plaintiffs from Olmsted \$80.79, and this without taking into consideration what they may have realized out of the property in the supply stores covered by the chattel mortgage.

The only chance for the plaintiffs to have been injured by the result of the verdict in this case, so far as we can make it out from the record, lays in the possible overvaluation of the property replevied by the appraisers under their writ. But the value of the property as found by the appraisers is

not conclusive. It is accepted only in the absence of evidence more satisfactory. As the plaintiffs did not contest this valuation, we must conclude they were satisfied with it.

3. It is objected that the verdict of the jury should have been for a return of the property to the sheriff, and that the judgment for the amount of the sheriff's lien was erroneous. We think the verdict was in harmony with the statute (Howell's Statutes, secs. 8342, 8351), which reads as follows:—

“Sec. 8342. When either of the parties to an action of replevin, at the time of the commencement of the suit, shall have only a lien upon, or special property or part ownership in, the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages, in all cases arising under this chapter; and the finding of the jury or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties.”

“Sec. 8351. If any goods or chattels which are replevied had been attached, they shall, in case of judgment for a return, be held liable to the attachment, until final judgment in the suit in which they were attached, and for thirty days thereafter, in order to their being taken in execution; and if such final judgment be rendered before the return of the property, or if the property when replevied was seized and held on execution, it shall be held subject to the same attachment or seizure for thirty days after the return, in order that the execution may be served thereon, or the service thereof completed, in like manner as it might have been if such property had not been replevied.”

We distinguish this case from that of *Frederick v. Circuit Judge*, 52 Mich. 529. In that case the sheriff had seized the goods under an attachment, and was asking a return of the property. There was no way of determining at that time what the value of his special interest was. No judgment had been obtained, and it was possible that none would be. We do not wish to be understood as holding that the sheriff in this case might not have taken a judgment for a return of the property, but simply that he had a right to waive such return, and take a judgment for the amount of his lien, which was established, if he so elected. It was held by this court in *First Nat. Bank v. Crowley*, 24 Mich. 499, that where property is taken from the possession of the sheriff, who held it under executions, by a

plaintiff in replevin without right, the sheriff might take a judgment for the full value of the property. If he could do that, he certainly could take judgment for any amount less than the full value of the property, which should be equal to the amount of his executions: *Moore v. Vrooman*, 32 Mich. 526.

It is objected that the record does not show that the defendant expressly waived a return of the property, and that for this reason the verdict and judgment should be set aside. We think the fact that the defendant accepted a verdict for the value of his liens, and caused judgment to be entered upon such verdict, is sufficient evidence of his election to waive a return.

The judgment must be affirmed, with costs.

CHATTEL MORTGAGE — AMOUNT SECURED. — A chattel mortgage or bill of sale which from its face appears to have been given to secure the payment of a certain specified debt or amount of indebtedness, without anything appearing to indicate that it was intended to secure any other or greater sum, cannot be extended, as against the mortgagor's creditors, by parol agreement to cover other indebtedness or future advances not specified at the time of its execution; and therefore future advances, under a parol agreement subsequent to the execution of the mortgage, and not mentioned therein, are not secured thereby: *Sims v. Mead*, 29 Kan. 124; *Diver v. McLaughlin*, 2 Wend. 596. Of course a mortgage to secure future advances is generally considered valid as to all parties, nor need the instrument express the fact that it is intended to secure such advances. Still, when the amount secured is definitely fixed by the mortgage, it will be deemed valid as against creditors of the mortgagor only to the amount specified therein: *Speer v. Skinner*, 35 Ill. 282. So a chattel mortgage given to secure certain indebtedness therein expressed cannot be so extended as to become a lien for the amount of an award for other and different indebtedness: *Morris v. Tillson*, 81 Ill. 607. And where a first mortgagee upon a crop for a specified amount of supplies exceeds in his advances the amount specified, he will be postponed as to the excess to the claims of a subsequent mortgagee: *Franklin v. Meyer*, 36 Ark. 97; or where a chattel mortgage is given to secure a debt and another liability, and the mortgage speaks only as to the debt, it will be valid as to the debt, but invalid as security for the liability: *Sumner v. Dalton*, 58 N. H. 295. So a mortgage conditioned for the payment of a promissory note on a certain date, and of "all other indebtedness that may then be due" from the mortgagor to the mortgagee, does not secure an account contracted after that date: *Fort v. Black*, 50 Ark. 256.

PEOPLE v. FOSS.

[80 MICHIGAN, 559.]

HIGHWAYS, RIGHT TO GRASS GROWING IN. — When, upon a public highway, the travel has been in a uniform beaten track, leaving grass to grow and ripen undisturbed upon the sides of such track, no one but he who owns the fee has the right to harvest it, and he can not only maintain trespass or trover against any person cutting and taking it away against his will, but he has the right to protect it against wanton or malicious damage or destruction, whether it is attempted to be done under the guise of travel upon the highway or in some other way.

Avery, Jenks, and Avery, for the appellant.

B. W. Huston, attorney-general, and *S. L. Merriam*, prosecuting attorney, for the people.

MORSE, J. Defendant was convicted of assault and battery upon one August Stieman, in justice's court. Upon appeal to the circuit court for the county of St. Clair, he was again convicted by the verdict of a jury. He brings his case to this court upon exceptions before judgment.

The place of the alleged assault was in a public highway, and as the defendant claims, upon that portion of the same within the half adjoining his father's lands. The farm of the complainant lies opposite his father's, and on the other side of this highway. There is a ditch running close to the fence on defendant's father's side of the road. Between this ditch and the usually traveled track of the highway there was a strip of grass-land, from a rod to a rod and a half in width, extending the whole length of the father's premises. Grass had grown there many years, and when in condition had been cut, sometimes by defendant and his father, and occasionally by Stieman. There had been more or less controversy about this grass, which finally culminated in the affray causing this suit.

The defendant lived with his father. On June 15, 1889, Stieman was drawing rails from his fence, on the south side of the road, to his orchard, using the highway for that purpose. He was drawing the rails upon a crotch between three and four feet wide. Stieman, after loading, drove on the north side of the center of the road, outside of the beaten or traveled track, and upon the grass. Defendant was mowing. Stieman claims that he told defendant to get out of the way. The elder Foss was there with a bushel-basket and rake, gathering the cut grass into the basket. They acted as if they did not

hear Stieman, and he "told his horses to get up, and the boy then went on the north side of the road, and the old man stood on the south side of the road; . . . and as I went by, the boy cut my horse on the backside with the scythe with which he had been mowing."

They had some hard words, and Stieman testifies that as he was driving on the defendant came up behind him and struck him twice on the neck. Stieman was corroborated in his testimony by his son. Defendant testified that Stieman came across the road, and drove his team upon him; that he threw his scythe into the fence corner, and shoved the horses back with his hands. Stieman dropped his lines, "and hauled off," and said, "'I will kill you.' When I see he was going to hit me, I pushed him back. I gave him two pushes, one after the other; and when he see I was pushing him, he went straight across the road and got a scythe, and came up to me, and hauled off three times, and says: 'I cut you in two.'"

Defendant stepped back out of his way, and finally Stieman went away, with threats of future hurt to defendant. Defendant was supported in his testimony by the evidence of his father. The record also states that other witnesses were produced by the prosecution, who gave testimony in corroboration of the facts testified to by Stieman and his son; and the defendant produced other witnesses, who gave evidence in corroboration of the facts sworn to by himself and his father.

The excuse of Stieman for driving on the grass was, that the road was muddy. He admitted that there was grass on his own side, but claimed that it was not wide enough to drive on. The testimony on the part of the defendant showed that the road was sandy, and although it had rained two days before, the road was not muddy. The beaten track was somewhat nearer Stieman's fence than it was that of Foss; but it is clear that Stieman drove over on the grass for the express purpose of damaging it, as there was room between the beaten track and the uncut grass to drive upon the sward where the grass had been cut. It is also evident from the record that there was bad blood between the parties, growing out of their rights in the highway as claimed by each. It was claimed by Stieman that Foss had pastured his cattle in the road, and that he had forbid it, because they trespassed upon his side of the highway, but that he did not quarrel with Foss about the grass on Foss's side of the road. He admitted, however, that

he cut it one year, and pastured it another. Foss and his son testified that Stieman told them that if they would let him have one swath on their side of the road, he would make them no trouble, and that when he drove upon the grass, he also purposely stamped it down with his feet.

The defendant's counsel requested that the following instruction be given to the jury, which was refused: "That the defendant had a legal right to cut the grass on his side of the highway; that the grass there growing belonged to him,—as much so as the grass growing on any other part of his farm,—and for the purpose of harvesting the grass so growing on his side of the highway, he had a right to be there, in person, for that purpose, either of his own right, or as the servant of his father, who appears to be the owner of the land, so long as he did not interfere with the free and ordinary use of the highway for public travel."

And also, that defendant had a right to protect the grass, and in so protecting it from being run over and destroyed by Stieman, he would be justified in using as much force as would be necessary to keep Stieman from destroying it; and if the jury found that no more force was used than was necessary to protect it, their verdict should be for the defendant. The court was also asked to charge, in substance, that Stieman was a trespasser on that side of the highway, and liable to be put off by the defendant, if no more force was used than was necessary to protect the grass, unless the jury found that it was necessary for Stieman to drive there in order to have the free and customary use of the highway for public travel.

The circuit judge refused to so charge, and instructed the jury that, as to the question of the right of Stieman to travel where he did in the highway, as a matter of law, a person had a right to travel where he pleased upon any part of the wrought portion of the highway; that it was usual to dig ditches on each side, and throw the earth taken from that, and construct a road-bed, and that the travel is usually between these ditches; and that any person, in traveling along the highway about his business, has the right, absolutely, to go where he pleases, so long as he does not interfere with other persons traveling on the highway.

"I think the public, or any one of the public, has the right to go wherever their judgment might dictate, or their caprice may lead them to go; that because it happens that the beaten track is in a certain locality, it need not always remain just

there, and we know, as a matter of fact, it changes according to the caprice of the public, or circumstances, of which I might enumerate many, and one person has a right to commence to change that track as well as another. There may be reasons why a person may desire to go upon grass-ground instead of the beaten track; and whatever the reason may be, I instruct you, as a matter of law, that a person has a right to go where he chooses along that wrought portion of the road. And if it is a fact that the defendant in this case made an assault upon Mr. Stieman because he persisted in exercising that right, and in driving upon the grass, and struck him, then he is guilty of assault and battery as charged in the complaint."

The point in controversy is thus sharply defined by defendant's requests and the charge of the court above stated. It seems to me a novel and interesting question. It is undisputed that Stieman was driving upon growing grass within the wrought portion of the highway, but outside of the beaten or customary track of wagons, and within that portion of the highway the fee of which was in defendant's father. The defendant was under age, and working for his father. The father had the right to this grass, not only as against Stieman, but all the world, unless it was necessary to destroy it for the needs of public travel. If Stieman had cut the grass and carried it away, Foss could have sued him in trespass for so doing, or recovered from him in trover the value of the grass thus converted. This is certain, within all the authorities. The fee of the land was in Foss, subject only to the easement of the public to use it for the purpose of a highway. He had the right to use it, and to enjoy the profits of it, in any way not incompatible with the public enjoyment of the right of way: *Woodruff v. Neal*, 28 Conn. 169; *Suffield v. Hathaway*, 44 Conn. 521, 527; 26 Am. Rep. 483; *Stackpole v. Healy*, 16 Mass. 33; 8 Am. Dec. 121; *Cooley on Torts*, 318; *Holladay v. Marsh*, 3 Wend. 142; 22 Am. Dec. 678; *Campau v. Konan*, 39 Mich. 362, 365; *Adams v. Emerson*, 6 Pick. 57; *Clark v. Dasso*, 34 Mich. 86; *People v. O'Brien*, 60 Mich. 8, 13; *Ellsworth v. Lord*, 40 Minn. 337; *Wolf v. Holton*, 61 Mich. 550, 553; *Washburn on Easements*, 4th ed., 10; *Coburn v. Ames*, 52 Cal. 385; 28 Am. Rep. 634. It is plain enough from this record that the complaining witness, Stieman, drove where he did without necessity, and for the express purpose of destroying the grass.

The question arises whether he had the right, from mere

caprice or express malice, to destroy this grass by driving upon it, and stamping it under his own and his horses' feet, because it happened to be between the two ditches, and in a space usually known as the wrought or traveled part of the road, when he would have no right to go and cut and carry it away for his own use. I think not. If the jury had found that Stieman drove on this grass, when it was not necessary, for the purpose of damaging or destroying it, and that all the defendant did was to push the horses off from it, and when attacked by Stieman for this, did no more than was necessary in order to push him away from him, it would have been their duty to have acquitted him. It may not be desirable that grass should grow and be harvested in the wrought portion of the highway, but when, upon a rural or country road, the travel has been in a uniform beaten track, leaving grass to grow and ripen undisturbed upon the sides of such track, no one but the abutting land-owner, who owns the fee, has the right to harvest it; and he can not only maintain trespass or trover against any person cutting and taking it away against his will, but he has the right to protect it against wanton or malicious damage or destruction, whether it is attempted to be done under the guise of travel upon the highway or in some other way. In this case the complaining witness could not have destroyed this grass by turning his cattle upon it to pasture it. Neither, in my opinion, could he drive his horses and wagon upon it to trample it under foot, when it was not at all necessary to do so, and while he knew Foss and his son were at work gathering it. The law does not permit or encourage any "dog-in-the-manger" business of this kind.

In *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58, the plaintiff brought an action to recover damages for the destruction of a hedge within the limits of a highway. The court held that so long as the enjoyment of a right of way was unobstructed, there was no reason why the easement of a highway should afford a justification to an individual for the needless destruction of property belonging to the owner of the land merely because it happened to be within the bounds of the road as laid and established. And in *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 233, 38 Am. Rep. 246, Judge Marston says: "Ordinarily, it may be said that the entire width of the highway may be used; yet the owner of the land over which it passes may, within the limits thereof, plant trees, set posts, and do such other acts as will add to his

convenience or assist in beautifying his premises. He is encouraged in doing this by public sentiment. . . . Public convenience may in time, in particular locations, require the removal of some of these things; and whenever the necessity arises, and the public authorities request their removal, then the private must give way to the public or paramount right. But while permitted to remain, no one traveling the highway could willfully injure or destroy them; and should any one do so, he would justly be held responsible, notwithstanding his plea of a claim of right to travel over any part of the highway."

And at page 234, speaking of the relative rights of the steamer and the riparian proprietor, he says: "The right of navigation, while paramount, is not exclusive, and cannot be exercised to the unnecessary or wanton destruction of private rights or property, where both can be freely and fairly enjoyed."

So in this case, while the right of travel upon the highway was paramount, Stieman could not exercise that right, in caprice, or wantonly, to destroy the property, — the grass, — without any necessity, of Foss, and where both the right of travel and the harvesting and preservation of this grass could be freely and fairly enjoyed.

The circuit court was in error, and the verdict of the jury must be set aside, and a new trial granted the defendant.

HIGHWAYS — RIGHTS OF ABUTTING OWNERS TO TREES, HERBAGE, ETC., GROWING IN THE HIGHWAY. — The freehold, and all the profits of the soil, belong to the proprietor from whom the right of passage was acquired, and he may make any use of his lands not inconsistent with the enjoyment of such right of passage: *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908. For the fee remains in the owners of the lands through which a highway runs: *Williams v. New York etc. R. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651; the public acquiring merely an easement therein: *Stinson v. Gardiner*, 42 Me. 248; 66 Am. Dec. 281, and note; *Kincaid v. Indianapolis Nat. G. Co.*, 124 Ind. 577; 19 Am. St. Rep. 113. The owner of land taken for a public highway, still owning the fee, owns the herbage, trees, and minerals that are upon or within the land, subject only to public use for the purposes for which the land was taken, and incidental purposes: *Brainard v. Clapp*, 10 Cush. 6; 57 Am. Dec. 74; *Winter v. Peterson*, 22 N. J. L. 524; 61 Am. Dec. 678; *Cole v. Drew*, 44 Vt. 49; 8 Am. Rep. 363; note to *Mayhew v. Norton*, 28 Am. Dec. 303-306. The owner may therefore maintain trespass against one who puts his cattle upon the highway to graze, or who makes use of the road for any purpose other than to use it for passing and repassing: *City of Dubuque v. Maloney*, 9 Iowa, 451; 74 Am. Dec. 358, and note. So he may maintain an action against one who, not acting under statutory or official authority, destroys or removes trees,

shrubs, etc., which are growing in the highway, and which do not constitute a nuisance to the traveling public: *Phifer v. Cox*, 21 Ohio St. 249; 8 Am. Rep. 58. And when trees, herbage, and such things, growing in a highway, do constitute a nuisance to a traveler, though he may have a right to remove them in order to enable him to properly exercise his rights in the highway, yet he becomes a trespasser by converting them to his own use: Note to *Phifer v. Cox*, 8 Am. Rep. 62. In *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363, where defendant's wife, under permission from the highway surveyor, cut grass growing in the highway over plaintiff's land, that her children, passing along there on their way to school, might not wet their clothes, it was decided that, while she had the right to cut down the grass, she became liable for trespass by carrying the grass away and feeding it to her husband's horse. In *Robinson v. Flint etc. R. R. Co.*, 79 Mich. 323, 19 Am. St. Rep. 174, it is decided that a public highway cannot be used for a public pasture, but that each owner may use that portion of the highway for pasturage purposes which is opposite his own premises. In *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536, it was held that adjacent land-owners may lawfully use the space in a street between the carriage-path and the sidewalk for growing trees for ornament or use, and that their owners are warranted in employing sufficient force to protect them from destruction.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

MOORE v. RUGG.

[44 MINNESOTA, 28.]

PHOTOGRAPHER, RIGHT OF, TO USE NEGATIVE OF CUSTOMER. — The contract between a photographer and his customer includes, by implication, an agreement that the negative for which the customer sits shall only be used for the printing of such photographic portraits as he may order or authorize, and an action lies for a breach of this implied contract.

ACTION to recover damages. The trial court overruled a demurrer to the complaint, and the defendant appealed. The other facts are stated in the opinion.

J. L. Dobbin, for the appellant.

Lane and Johnson, for the respondent.

COLLINS, J. The complaint in this action is not a model, as is admitted by the attorney who drew it, but it appears therefrom that defendant, a photographer, had been employed to make, and had made and sold to plaintiff, a number of photographic portraits of herself; and that subsequently, without the order or consent of plaintiff, he made and delivered to a detective another of these photographs, who used it in a manner particularly stated in the pleading, and claimed to have been highly improper. In justice to defendant, it is right that we should here remark that it is nowhere averred in the complaint that the occupation of the detective was known to him, or that he knew that the photograph so delivered was to be used in the manner stated in the complaint, or in any other improper way. This action was brought to recover damages,

and this appeal is from an order overruling a general demurrer to the complaint. A good cause of action was therein stated, for which nominal damages, at least, may be recovered. The object for which the defendant was employed and paid was to make and furnish the plaintiff with a certain number of photographs of herself. To do this a negative was taken upon glass, and from this negative the photographs ordered were printed. An almost unlimited number might also be printed from the negative, but the contract between plaintiff and defendant included, by implication, an agreement that the negative for which plaintiff sat should only be used for the printing of such portraits as she might order or authorize: *Pollard v. Photographic Co.*, L. R. 40 Ch. Div. 345. The complaint shows that there was a breach of this implied contract.

Order affirmed.

CONTRACTS — ACTION FOR BREACH. — Upon a breach of a contract, the party injured has a right of action against the other to recover damages: *Jenkins v. Temples*, 39 Ga. 655; 99 Am. Dec. 482. The law infers damage from every infringement of a right: *McConnel v. Kibbe*, 33 Ill. 175; 85 Am. Dec. 265.

REYNOLDS v. FRANKLIN.

[44 MINNESOTA, 80.]

MEASURE OF DAMAGES IN ACTION FOR FRAUDULENT REPRESENTATIONS OF TITLE. — Where a party is induced by the false and fraudulent representations of another to exchange with him certain merchandise for three separate parcels of land, and the title to one of the parcels fails, the measure of damages is the market value of the property that he parted with. And in such case he is entitled to recover such proportion of the total value of the merchandise as the value of the tract of land to which the title failed bears to the aggregate value of the three tracts for which he traded.

ACTION for false representations. The opinion states the case.

R. B. Forrest, for the appellant.

Russell and Reed, for the respondent.

COLLINS, J. This case appears for a second time in this court, it having been heretofore reported in 39 Minnesota, 24, where it was held that plaintiff might recover, as for fraud, upon evidence going to show false representations by defendant, made as of his own knowledge, respecting the title to real estate, to

plaintiff, who, being ignorant of the facts, purchased relying upon the representations. From the testimony in the case as certified up, it appears that while this transaction is not the one considered in an action between these same parties (41 Minn. 279), it is of the same general character. It was a trade or exchange of a quantity of personal property (merchandise) owned by plaintiff for several tracts of land owned or controlled by defendant. In the case just mentioned, defendant, after receiving the personalty, refused to convey certain of the tracts of land as he had agreed to do, and plaintiff's action was upon contract; while in this, the title as to one parcel of land, conveyed by a third person at defendant's request to plaintiff, wholly failed, and his action is one of tort, based on alleged false and fraudulent representations as to the title.

The principal contention between the parties is as to the measure of damages, and upon this matter the trial court erred in its rulings, as well as when charging the jury. The amount the plaintiff was entitled to recover was not the price fixed or placed by the parties, when making their trade, upon the tract of land in question, for the action was in tort; and if the jury believed that defendant was guilty of the false and fraudulent representations alleged, and that plaintiff parted with his property relying upon the same, then defendant was bound to make good the loss sustained, — he was liable to respond in such damages as naturally and proximately resulted from the fraud. But that would not necessarily be the fixed price placed upon the real estate by the parties. It might be less, and it might prove to be more. The actual loss sustained was the market value of the personal property which, by means of a fraudulent act, defendant had secured from the plaintiff. It was not a question of what the latter might have gained, but of what he lost by reason of defendant's deception. The suit was not brought for breach of contract, but the *gravamen* of the complaint was the alleged deceit and fraud of the defendant, by means of which the plaintiff was induced to part with his property. The actual loss which he sustained, and for which he can recover, is the value of the property so parted with. This is the true measure of damages in cases of this nature: *Smith v. Bolles*, 132 U. S. 125; *Woolenslagle v. Runals*, 76 Mich. 545.

This conclusion forces upon us a consideration of the manner in which this value may be ascertained, under the circumstances presented by the uncontradicted testimony in this case;

the plaintiff having exchanged a quantity of merchandise for three distinct tracts of land, the title of one parcel only, conveyed by a separate deed, proving defective. The counsel for appellant claims that there is no method of establishing by testimony the value of that portion of the merchandise traded for this particular piece of real property, quoting, in support of his position, a remark inadvertently made by the writer hereof in the opinion (41 Minn. 279) heretofore alluded to. In neither of these cases have we had the aid of counsel in the examination of or citation of authorities upon this somewhat perplexing question, nor, with the limited time at our disposal for such work, have we been able to find an adjudicated case in point. But upon reflection, it has seemed to us that the rule which would be the most practical and satisfactory is that adopted in actions brought upon covenants of warranty in conveyances of land, where a round sum of money has been paid, or property exchanged, for real estate to which the title has failed in part. For a partial breach, damages will be assessed *pro tanto*, according to the recognized standard of damages for a total breach. Where a part of one parcel is lost by failure of title, or the title fails to an undivided part of the whole, the measure of damages is a ratable part of the consideration or value of such parcel, or of the entirety, ascertained in the same manner. When the title fails to a specific part of the subject of the sale or trade, either party may, for the purpose of affecting the damages, produce evidence to show the relative value which that part bears to the whole. The law will apportion the damages to the measure of value between the land lost and the land preserved. Eviction of a part of the estate sold not only gives an action on the warranty, but the recovery will be a proportion of the price paid in a ratio to the amount of the part from which an eviction has been had: *Morris v. Phelps*, 5 Johns. 49, 56; 4 Am. Dec. 323; Rawle on Covenants, sec. 187; 2 Sutherland on Damages, 288. The plaintiff's title failed as to one tract of land, but remained good as to other tracts, which, although not conveyed by the same deed, were included in the same consideration, — the plaintiff's merchandise, — the total value of which, as well as the value of each tract of land, can easily be established upon trial. Had this action been upon a covenant of warranty, plaintiff's damages would have been ascertained by apportionment. He would have recovered such proportion of the total value of his merchandise as the value

of the tract of land to which he obtained no title bore to the value of the three tracts, — the whole quantity, — for which he traded. This rule is a just one, and may safely be adopted and applied here.

Order reversed.

MEASURE OF DAMAGES — SALE OF REALTY. — The rule of damages for false representations in the sale of land is the difference between its actual value and its value if the alleged facts regarding it had been true: *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; compare *Kirkpatrick v. Downing*, 58 Mo. 32; 17 Am. Rep. 678, and particularly note 687-691. The basis of damages for a partial failure of title is the relative general value of the part to which the title fails compared with the whole: *Phillips v. Reichert*, 17 Ind. 120; 79 Am. Dec. 463, and note; *Beaupland v. McKeen*, 28 Pa. St. 124; 70 Am. Dec. 115, and note. If several tracts of land are sold for a gross sum, and no specification is made as to the quality of each parcel, and there occurs a deficiency in the quantity of one or more tracts, the purchaser will be entitled to compensation for the deficiency according to the average value of the whole tract, and not of the several tracts taken separately: *Nelson v. Matthews*, 2 Hen. & M. 164; 3 Am. Dec. 620.

In an action for fraudulent representations as to shares of stock, whereby plaintiff was induced to exchange his realty for the same, the measure of damages is the difference between the actual value of the stock and its value as represented, and not the value of the land exchanged: *Nysegander v. Lowman*, 124 Ind. 584.

BECKER v. NORTHWAY AND INTERVENER.

[44 MINNESOTA, 61.]

SET-OFF OF DEBT DUE PRINCIPAL IN ACTION AGAINST SURETY. — In an action against a surety the defendant may set off a debt due from the plaintiff to the principal debtor, if the latter is a party and is insolvent.

INTERVENTION BY PRINCIPAL IN ACTION AGAINST SURETY. — Where a surety is sued alone, the principal debtor may intervene in the action and set off a debt due him from the plaintiff.

SET-OFF, BREACH OF CONTRACT INVOLVING TORT MAY BE USED AS. — A breach of contract, though it also involve a tort, may be used as a set-off.

ACTION upon a guaranty. The opinion states the case.

G. E. Matile, and Matile and Brice, for the appellant.

E. D. Jackson, for the respondents.

GILFILLAN, C. J. The action is upon defendant's written guaranty of payment of any indebtedness arising from samples sent one J. L. Barry by plaintiff for the purpose of taking orders for plaintiff by Barry, the condition of the guaranty, as

expressed in the writing, being "that said Barry is to account, as per invoice, for all samples received from said Becker." The complaint alleges the delivery, by plaintiff to Barry, on the faith of the guaranty, of samples to the value of \$450.62, and the failure of Barry to account for them, and asks judgment for such value. The defendant answered, setting up as a first defense that, on a date specified, Barry executed to plaintiff his promissory note for \$650, and a mortgage on real estate to secure it, and delivered them to plaintiff, under an agreement by which plaintiff was to negotiate and sell the same at their face value, and pay the proceeds to Barry, but instead of doing so, he foreclosed the mortgage, bid in the property at the sale, — it then being worth at least \$1,000; and for a second defense, it alleges that Barry, being in the employment of plaintiff as a salesman, during a period, being part of that during which the samples were delivered, earned, at the commissions agreed on between them, in taking orders and selling goods for plaintiff, \$335.03, of which but \$253.95 has been paid, leaving \$81.08 unpaid. The answer also alleges that Barry is insolvent, and plaintiff a non-resident; and it also alleges the fact that Barry has intervened in the action, and sets forth the complaint in intervention to show the grounds thereof. It asks that the amounts found due Barry be applied in liquidation of the claim alleged in the complaint. Barry intervened in the action, and in his complaint sets forth the claims that are set forth in the defendant's answer, and asks judgment for the amounts of the claims, less the amount claimed in the complaint. Plaintiff demurred both to the answer and the complaint in intervention, and his demurrers were overruled.

As between plaintiff and defendant, the claims set forth in the answer were not legal counterclaims, because they were not causes of action in favor of defendant. The commissions earned by Barry would be a defense *pro tanto* to the cause of action alleged in the complaint, just as partial payment by Barry would be; for those commissions being earned, manifestly, in the use of the samples and the business and purpose for which they were furnished, they were proper items to be allowed in accounting for the samples. The matter of the note and mortgage, conceding that Barry might elect to treat it as a claim founded on contract, would not be a legal defense, but if sustained at all, must be sustained as an equity in favor of defendant, within the meaning of the General Stat-

utes of 1878, chapter 66, section 96, subdivision 3. The test of such equity was stated by this court as early as *Gates v. Smith*, 2 Minn. 21 (30): "The test of the sufficiency of any particular defense, equitable in its nature, must be, whether, had the same facts been presented by a bill in chancery, would that court have entertained the case, and granted the relief sought here?" This was approved and applied in *Barker v. Walbridge*, 14 Minn. 351 (469); *Birdsall v. Fischer*, 17 Minn. 76 (100); *Williams v. Murphy*, 21 Minn. 534. Could the defendant have maintained an equitable action to enforce, for his protection, the set-off of the claims in favor of his principal, assuming that on the matter of the note and mortgage to be founded on contract, to the entire or partial extinguishment of this plaintiff's claim against him? In the absence of special circumstances, courts of equity followed the rule of law in the matter of set-off. But the rule was subject to exceptions. As said by the court in *Lindsay v. Jackson*, 2 Paige, 581: "In a case not within the statute of set-off, a court of equity will permit an equitable set-off, if, from the nature of the claim, or from the situation of the parties, it is impossible to obtain justice by a cross-action." Or as it is stated by Story (2 Eq. Jur., sec. 1437 a): "Courts of equity will extend the doctrine of set-off beyond the law in all cases where peculiar equities intervene between the parties." Where such equities exist, a court of equity will set off a separate debt against a joint debt, or, conversely, a joint debt against a separate debt, — in other words, accruing in different rights. And the author last quoted says (section 1437): "So if one of the joint debtors is only a surety for the other, he may, in equity, set off the separate debt due to his principal from the creditor; for in such a case the joint debt is nothing more than a security for the separate debt of the principal." The author may here state the rule more broadly than the decided cases will justify; for the interposition of a court of equity to enforce set-offs that would not be allowed at law was based on the condition that otherwise the surety would be without adequate remedy. Bankruptcy or insolvency of the principal debtor presents such a case; for if the surety be, in such case, compelled to pay, and resort to an action against the bankrupt or insolvent principal debtor, he is practically without remedy. So where a remedy may be afforded him without prejudice to the creditor suing him, — and ordinarily he cannot be prejudiced by setting off a debt he owes the principal.

against the principal's debt to him, for which he is suing the surety, — equity will furnish that remedy: *Ex parte Hanson*, 18 Ves. 232; *Cheetham v. Crook*, McClel. & Y. 307; *Wathen v. Chamberlin*, 8 Dana, 164; *Gillespie v. Torrance*, 25 N. Y. 306; 82 Am. Dec. 355; *Hiner v. Newton*, 30 Wis. 640.

We do not mean to intimate that the surety, when sued alone, may, in that action, have the set-off; for a court will, if possible, avoid the litigation of a debt when only one of the parties to the debt is before it. The surety might have to bring a separate action against the creditor and principal debtor to enforce the set-off, and, pending that action, enjoin the action against him.

The objection that the proper parties are not before the court does not exist in this case, if Barry, the principal debtor, had a right to intervene in the action. That he might intervene, for the purpose of defeating a recovery by plaintiff, we cannot see there is any doubt. The statute (Gen. Stats. 1878, c. 66, sec. 131) allows "any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against either or both," to intervene, and either prosecute or defend. Taking the construction put upon this in *Bennett v. Whitcomb*, 25 Minn. 148, and *Lewis v. Harwood*, 28 Minn. 428, that the interest must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment, this case comes directly within it. If, in the action as originally brought, judgment had gone against the defendant, and had been enforced against him, the intervener might have to reimburse him; but had it discharged the defendant of liability to the creditor, it would have terminated the intervener's obligation as indemnitor. Indeed, we can hardly conceive a case more within the spirit and intent of the statute than one in which the intervener stands in the relation of indemnitor to one of the parties.

As to the first matter of defense in the answer, and set-off in the intervener's complaint, to wit, in relation to the note and mortgage, it is, so far as any question is presented by the demurrers (the question of the rule of damages not being involved), very clear. A contract and a breach of the contract are alleged. If there is also a tort alleged, that does not prevent a recovery for the breach of contract. It may make a case where there must be an election between proceeding for the breach of contract and for the tort. If so, the election is

made by using it as a cause of action arising on contract may be, and one arising upon tort may not be, used, to wit, as a set-off.

Orders affirmed.

SET-OFFS — PRINCIPAL AND SURETY. — As to what may be set off in action against a principal and his surety, see note to *Gregg v. James*, 12 Am. Dec. 155, 156. In *Baltimore etc. R. R. Co. v. Bitner*, 15 W. Va. 455, 36 Am. Rep. 820, it is decided that a surety, in an action against him alone on a bond for the faithful performance of services, cannot offset a claim of the principal against plaintiff for services in the business in which the bond was given.

BARDWELL v. COLLINS.

[44 MINNESOTA, 97.]

SERVICE BY PUBLICATION, IN PERSONAL ACTION, ON PERSONS WITHIN STATE NOT DUE PROCESS OF LAW. — In actions in *personam* strictly judicial in their character, and proceeding according to the course of the common law, service of the summons by publication, upon resident defendants who are personally within the state, and can be found therein, is not due process of law. And a statute which assumes to authorize such service in actions to foreclose mortgages is unconstitutional and void.

ACTION to enforce a mechanic's lien. The opinion states the case.

Daniel Fish, for the appellant.

Harlan P. Roberts, for the respondents.

MITCHELL, J. The questions raised by this appeal involve the construction and validity of the provisions of General Statutes of 1878, chapter 81, title 2, section 28, relating to the service of the summons in actions for the foreclosure of real estate mortgages, which, by section 8, chapter 90, of the same statutes, are made also applicable to actions to enforce mechanics' liens. This action was one to enforce a mechanic's lien, the complaint alleging that the defendant, Collins, claimed a lien or interest in the property on which the lien was sought to be enforced, but that it was subsequent and inferior to plaintiffs' lien, and that no personal claim was made against him. It nowhere appears whether Collins was or was not a resident of the state. It must therefore be presumed that he was a resident, and could have been found within the jurisdiction of the court. The only service of the summons upon

him was by publication, and no affidavit for publication was ever filed with the clerk of the court, as provided by General Statutes of 1878, chapter 66, section 64. Judgment was entered against him on default, which he moved to have set aside on the ground that the court had never acquired jurisdiction of his person, because there had been no valid service of the summons. From an order denying this motion he appeals.

The legislation in this state regarding substituted service by publication of the summons in civil actions has been somewhat incongruous and complicated, the history of which in detail might be interesting, but not profitable for present purposes. Suffice it to say that from the earliest days of the territory down at least to 1866 such substituted service in actions strictly judicial in their nature, and proceeding according to the course of the common law, was only allowed where the defendant could not be found within the state, personal service being, in accordance with the uniform rule and practice from time immemorial, required in all cases where the defendant could be found and service made upon him within the jurisdiction of the court. And prior to 1869 an order of court granted upon an affidavit showing a state of facts authorizing service by publication was necessary; but by the Laws of 1869, chapter 73 (Gen. Stats. 1878, c. 66, sec. 64), publication was permitted merely upon filing the affidavit with the clerk of the court, an order of the court being no longer required. The filing of the affidavit is, however, a condition precedent to a valid service by publication upon a non-resident defendant: *Barber v. Morris*, 37 Minn. 194; 5 Am. St. Rep. 836. The first appearance of anything like section 28, title 2, chapter 81, General Statutes of 1878, was in the revision of 1866, where it will be found as section 25 of the same title and chapter. This was amended by the Laws of 1868, chapter 74, so as to read as it is now, except that the word "personal," qualifying the word "judgment," was omitted. This rendered it meaningless and inoperative, unless, by a very liberal and hardly allowable construction, the word "personal" could be read into it. It remained in this form until March 7, 1878, when, by chapter 6 of the laws of that year, the word "personal" was restored, so that it read as now found in General Statutes of 1878. In the mean time, title 1 of chapter 81, to which it refers, had been repealed by the Laws of 1877, chapter 121, and foreclosure by

advertisement entirely abolished. This mode of foreclosure was, however, restored by an act (Laws of 1878, c. 53), also passed March 7, but to take effect April 1, 1878, and which is now title 1, chapter 81, General Statutes of 1878. It is also worthy of note that on February 28, 1878 (only eight days before the last amendment of General Statutes of 1866, chapter 81, title 2, section 25), the legislature added a sixth subdivision to General Statutes of 1866, chapter 66, section 49, enumerating the cases where a summons might be served by publication on non-resident defendants, which is as follows: "When the action is to foreclose a mortgage or to enforce a lien of any kind on real estate in the county where the action is brought": Laws of 1878, c. 9. So much for the history of the legislation bearing upon the questions before us.

The provisions of General Statutes of 1878, chapter 81, title 2, with which we have now to do, are as follows:—

"Sec. 27. Actions for the foreclosure of mortgages shall be governed by the same rules and provisions of statute as civil actions, except as herein otherwise expressly prescribed.

"Sec. 28. Service by publication of the summons, in the manner provided in section 5 of title 1 of this chapter for publication of the notice of sale therein specified, may be made upon all parties to the action against whom no personal judgment is sought; and in such case judgment may be taken, without giving security as to those parties, at the expiration of twenty days after the completion of the period of publication; but such parties, or any of them, shall be permitted to appear and defend, upon good cause shown, at any time before final decree."

The questions presented are two: 1. Was section 28 intended to provide that in actions to foreclose mortgages the summons might be served by publication on resident defendants who could be found in the state? And as a subsidiary question, whether the provisions of General Statutes of 1878, chapter 66, section 64, providing for the filing of an affidavit with the clerk of the court, are applicable to such cases. 2. If the statute thus provides for service by publication on resident defendants, does such service constitute "due process of law"? We infer from the memorandum of the district judge that the subsidiary branch of the first question was the main, if not the only, point urged before him; and the second question is so faintly raised by the defendant in this court that we would hardly deem it incumbent on us to consider it, if the interests

of no one but himself would be affected by an erroneous assumption of the validity of such a statute.

We think it clear that the expression "personal judgment" is here used in the sense of a money judgment for the mortgage debt; and while the legislation on the subject, as we have narrated it, has been rather incongruous in some respects, and while we have been unable to discover where the commissioners who prepared the revision of 1866 found any precedent for so radical a departure from the uniform course of judicial procedure from time immemorial, and while we are unable to conceive what considerations induced them to adopt it, yet its plain and unequivocal language compels us to the conclusion that this statute was intended to provide that service of the summons by publication might be made on all defendants in foreclosure suits whom it was not sought to hold personally liable for the mortgage debt, although residents of the state, and personal service might be made on them within its jurisdiction. And if this be so, it would seem to follow that the provisions of section 64, chapter 66, as to filing an affidavit, could not apply to such cases; for by the very terms of that section it is only applicable to cases where the defendant is a non-resident and cannot be found within the state. Where such are not the facts, the required affidavit cannot be truthfully made.

The only remaining question, therefore, is, whether it is competent for the legislature to authorize such service in such actions upon residents of the state personally present, and capable of being found and personally served, within its jurisdiction. Is such service "due process of law"? In determining this question, it becomes important, first, to consider the character of an action to foreclose a mortgage. It is not an action *in rem*, but an action *in personam*. It is true, it has for its object certain specific real property against which it is sought to enforce the lien of the mortgage; and in that sense it partakes somewhat of the nature of a proceeding *in rem*, but not differently, or in any other sense, than do actions in ejectment, replevin, for specific performance of a contract to convey, to determine adverse claim to real estate, and the like. The rights and equities of all parties interested in the mortgaged premises are to be adjusted in the action, which proceeds, not against the property, but against the persons; and the judgment binds only those who are parties to the suit, and those in privity with them: *Whalley v. Eldridge*, 24 Minn. 358.

Next, it is not only an action *in personam*, but is also strictly judicial in its character, proceeding according to the due course of common law, like any other ordinary action cognizable in courts of equity or common law. These facts are important, for the reason that what would be due process of law in one kind of proceeding might not be such in another, for reasons that will be alluded to hereafter.

No court has ever attempted to give a complete or exhaustive definition of the term "due process of law," for it is incapable of any such definition. All that can be done is to lay down certain general principles, and apply these to the facts of each case as they arise. Mr. Webster, in his argument in the Dartmouth College case, gave an exposition of the words "law of the land" and "due process of law" which has often been quoted by the courts with approval, viz.: "The general law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." In judicial proceedings, "due process of law" requires notice, hearing, and judgment. It does not mean, of course, the general body of the law, common and statute, at it was at the time the constitution took effect; for that would deny to the legislature the power to change or amend the law in any particular. Neither, on the other hand, does "the law of the land" or "due process of law" mean anything which the legislature may see fit to declare to be such; for there are certain fundamental rights which our system of jurisprudence has always recognized which not even the legislature can disregard in proceedings by which a person is deprived of life, liberty, or property; and one of these is, notice before judgment in all judicial proceedings. Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient landmarks, or take away certain fundamental rights which have been always recognized and observed in judicial procedures. Hence it becomes important, in determining what kind of notice would constitute "due process of law" in any judicial proceeding affecting a man's property, to ascertain what notice has always been required and deemed essentially necessary in actions or proceedings of that kind, according to that system of jurisprudence of which ours is derivative. In proceedings *in rem*, as in admiralty and the like, where the process of the court goes against the thing, which is in the custody of the court, and is technically the defendant, and persons are

not made parties to the suits, but come in rather as interveners, it is not essential to the jurisdiction that the persons having an interest in the thing to be affected by the judgment should have personal notice of the proceeding, or in fact any other notice than such as is implied in the seizure of the thing itself. There are other proceedings in the nature of proceedings *in rem*, many of them not strictly judicial, and none of them proceedings according to the course of common law, — such as the probate of wills, administration on the estates of deceased persons, the exercise of the right of eminent domain, the exercise of the power of taxation, — which affect property rights, but in which personal notice to persons interested in the subject or object of the proceedings has never been deemed necessary. Some form of substituted service of notice, as by publication, has always, from considerations of public policy or necessity, been deemed appropriate to such proceedings, and hence, as to them, “due process of law.” But we think that, from the earliest period of English jurisprudence down to the present, as well as in the jurisprudence of the United States derived from that of England, it has always been considered a cardinal and fundamental principle that, in actions *in personam* proceeding according to the course of common law, personal service (or its equivalent, as by leaving a copy at his usual place of abode) of the writ, process, or summons must be made on all defendants resident and to be found within the jurisdiction of the court. We do not mean that the term “proceeding according to the course of the common law,” as used in the books, is to be understood as meaning, necessarily and always, personal or actual service of process; for although service by publication is of modern origin, there has always been some mode by which jurisdiction has been obtained at common law by something amounting to or equivalent to constructive service, where the defendant could not be found and served personally. But what we do mean to assert is, that the right to resort to such constructive or substituted service, in personal actions proceeding according to the course of the common law, rests upon the necessities of the case, and has always been limited and restricted to cases where personal service could not be made because the defendant was a non-resident, or had absconded, or had concealed himself for the purpose of avoiding service. As showing what means were resorted to as amounting or equivalent to constructive service, and how strictly it was limited to cases of necessity by both

courts of common law and courts of chancery, reference need only be had to 3 Blackstone's Commentaries, 283, 444.

As a substitute for the means formerly resorted to in England in such cases, most of the American states have adopted service of the process or summons by publication. But we have found no statute, except the one now under consideration, which has assumed to authorize such a mode of service, and have found no case where its validity has been sustained by the courts, except as to defendants who could not be found within the jurisdiction, either because of non-residence, or because they had absconded, or concealed themselves to avoid the service of process. We think this will be found true in every instance, from the earliest decisions on the subject down to the latest utterance of the supreme court of the United States in *Arndt v. Griggs*, 134 U. S. 316, in which that court took occasion to set at rest some misapprehensions as to the scope of their previous decision in *Hart v. Sansom*, 110 U. S. 151. We think it would be a surprise to the bench and the bar of the country if it should be held that process or summons in ordinary civil actions might be served on resident defendants, present and capable of being found within the jurisdiction of the court, merely by publication in a newspaper. The dangers and abuses that would arise from such a practice are too apparent to require to be named or even suggested. So radical a departure is this from the uniform and well-established ideas of what constitutes due process of law in such cases that, although this act has been on the statute-books for twenty-four years, we doubt whether one lawyer in twenty is aware of its existence; and we have yet to hear of any case, except the present, where any one has ventured to act upon it.

It is, in our judgment, beyond the power of the legislature to disregard so fundamental and long-established a principle of our jurisprudence. Service by publication, under such circumstances, is not "due process of law," and therefore any statute assuming to authorize it is unconstitutional. It would be of little use to cite authorities upon a subject which has been so much and so often discussed in its many phases, as each case must be determined upon its own facts, and hence the decided cases would ordinarily be in point only by way of analogy. See, however, *Brown v. Board of Levee Comm'rs*, 50 Miss. 468.

Order reversed.

WHAT IS DUE PROCESS OF LAW.—In the note to *Bank of the State v. Cooper*, 24 Am. Dec. 537-545, this question was discussed at length. It is now proposed to consider, under appropriate heads, points decided since that note was written.

DIFFICULTY IN DEFINING WHAT IS DUE PROCESS OF LAW.—In the former note it was pointed out how difficult, if not impossible, it is to frame a definition of the phrases "law of the land" and "due process of law," that will be accurate, complete, and applicable in all cases.

Mr. Justice Field, in delivering the opinion of the court in the recent case of *Dent v. West Virginia*, 129 U. S. 114, 123, discussing this question, said: "As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown, and place him under the protection of the law. They were deemed to be equivalent to 'the law' of the land.' In this country, the requirement is intended to have a similar effect against legislative power; that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property."

"DUE PROCESS OF LAW" NOT CONFINED TO JUDICIAL PROCEEDINGS.—Due process of law does not always mean judicial process. It is not confined to judicial proceedings, but extends to every case which may deprive the citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature: *Eames v. Savage*, 77 Me. 212; 52 Am. Rep. 751; *Weimer v. Bunbury*, 30 Mich. 201; *Stuart v. Palmer*, 74 N. Y. 183.

TAX PROCEEDINGS DUE PROCESS OF LAW.—Tax laws are laws of the land, and tax proceedings, conducted under equal and uniform laws, are due process of law: *Bagley v. Castile*, 42 Ark. 77; *Davies v. City of Los Angeles*, 86 Cal. 37; *Eames v. Savage*, 77 Me. 212; 52 Am. Rep. 751; *Abbott v. Lindemower*, 42 Mo. 162; *Matter of the Application of McMahon v. Palmer*, 102 N. Y. 176; 55 Am. Rep. 796; *Davidson v. New Orleans*, 96 U. S. 97; *Kelly v. Pittsburgh*, 104 U. S. 78; *Walston v. Nevin*, 128 U. S. 578. Mr. Justice Miller, in delivering the opinion of the court in *Davidson v. New Orleans*, 96 U. S. 104, said: "Whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. . . . It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

And in *Matter of Application of McMahon v. Palmer*, 102 N. Y. 176, 55 Am. Rep. 796, Ruger, C. J., in delivering the opinion of the court, said: "The proceedings by which taxes for governmental purposes have been assessed, levied, and collected from the citizen have always been regarded

as administrative, and not judicial, in their character, and to constitute due process of law within the meaning of the constitution. Such proceedings have, from necessity, been exercised by governments during all times, by summary methods of procedure; and to require the deliberation and delay incidental to judicial proceedings in the exercise and enforcement of the taxing power by the government would seriously cripple its efficiency, if not destroy its existence. These methods were in exercise and existence long before the adoption of the constitution, and have never been supposed to be affected thereby."

But the enforcement by a state of a tax levied under a void law is the deprivation of the owner of his property without due process of law: *Dundee Mortgage etc. Co. v. School District No. 1*, 19 Fed. Rep. 359. And a law that imposes an assessment for local improvements, without notice to, and a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed, deprives him of his property without due process of law: *Stuart v. Palmer*, 74 N. Y. 183. A proceeding for the assessment of property for taxes—that is, the ascertainment of its value upon evidence taken—is judicial in its nature. And to make a law authorizing such a proceeding valid, it must provide some kind of notice and an opportunity to be heard respecting it, before the proceeding becomes final, otherwise it will lack the essential ingredient of due process of law: *County of Santa Clara v. Southern Pacific R. R. Co.*, 18 Fed. Rep. 385.

PROCEEDING BY INFORMATION IS DUE PROCESS OF LAW.—A proceeding by information in a criminal case, instead of by indictment or presentment by a grand jury, as known to the common law of England, is due process of law: *Hurtado v. California*, 110 U. S. 516; *Kallock v. Superior Court*, 56 Cal. 229; *Rowan v. State*, 30 Wis. 129; *contra*, *Jones v. Robbins*, 8 Gray, 329. In the case of *Kallock v. Superior Court*, 56 Cal. 241, Morrison, C. J., who delivered the opinion of the court in *Bank*, said: "This proceeding, as [it] is regulated by the constitution and laws of this state, is not opposed to any of the definitions given of the phrases 'due process of law' and 'the law of the land'; but, on the contrary, it is a proceeding strictly within such definitions, as much so in every respect as is a proceeding by indictment. It may be questionable whether the proceeding by indictment secures to the accused any superior rights and privileges; but certainly a prosecution by information takes from him no immunity or protection to which he is entitled under the law. But the constitution of this state has made provision for this form of prosecution, and the legislature has furnished the machinery to enforce it. In our opinion, the proceeding is a legal and constitutional one."

And in the case of *Hurtado v. California*, 110 U. S. 537, Mr. Justice Matthews, who delivered the opinion of the majority of the court, after an extended discussion of the question, said: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law. . . . Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law,

which might include every case of an offense of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments."

PROCEEDING TO DISBAR ATTORNEY IS DUE PROCESS OF LAW. — A proceeding to strike an attorney from the roll is, when instituted in a proper case, due process of law: *Ex parte Wall*, 107 U. S. 265.

PROCEEDING TO ABATE NUISANCE IS DUE PROCESS OF LAW. — A proceeding in equity to abate a nuisance without a trial by jury is due process of law: *State v. Crawford*, 28 Kan. 726; 42 Am. Rep. 182; *Littleton v. Fritz*, 65 Iowa, 488; 54 Am. Rep. 19; *Carleton v. Rugg*, 149 Mass. 550; 14 Am. St. Rep. 446; *Kansas v. Ziebold*, 123 U. S. 623.

LEGISLATION GENERAL IN ITS OPERATION DUE PROCESS OF LAW. — Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case: *Dent v. West Virginia*, 129 U. S. 114; *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696.

STATUTES HELD TO DEPRIVE OF RIGHTS WITHOUT DUE PROCESS OF LAW. — A statute which makes the affidavit of the owner of stock killed or maimed on a railroad track conclusive evidence of the amount of damages sustained by the owner does not provide due process of law, and is therefore unconstitutional: *Savannah etc. R'y Co. v. Geiger*, 21 Fla. 669. A statute which makes the treasurer's deed conclusive evidence of the regularity of all prior tax proceedings is void, because it deprives the owner of his property without due process of law, so far as respects the essential prerequisites for the exercise of the taxing power: *McCreedy v. Sexton*, 29 Iowa, 356.

A statute which provides that the rates of charges for passengers and freights recommended and published by a state railroad commission shall be final and conclusive evidence as to what are equal and reasonable, and that there can be no judicial inquiry as to the reasonableness of such rates, deprives a railway company of its property without due process of law: *Chicago etc. R'y Co. v. Minnesota*, 134 U. S. 418. Mr. Justice Blatchford, in delivering the opinion of the majority of the court in this case, referring to the statute, said: "It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy."

An act which attempts to authorize an assessment upon lands alleged to be benefited by an improvement, without giving the owner any opportunity to be heard in regard to the assessment, but which makes the assessment an absolute lien upon the property, provides for a summary sale thereof to pay the assessment, without any suit or opportunity of defense to the owner, is an attempt to deprive him of his property without due process of law, and is unconstitutional and void: *Hutson v. Woodbridge Protection District*, 79 Cal. 90. A statute which confers upon a tribunal or body quasi judicial power to dispose finally of the property rights of an individual, but fails to provide for giving him notice, deprives him of his property without due process of law: *Kuntz v. Sumption*, 117 Ind. 1. A law which authorizes the summary seizure

and sale of property in use by a person from whom a license is due, without any notice to the owner, without any trial, and without any opportunity to be heard, is void, because it attempts to authorize the taking of property without due process of law: *Chauvin v. Valiston*, 8 Mont. 451.

An act which undertakes to charge the owner of a dog with the amount of damage done by his dog, as fixed by the selectmen of the town, without an opportunity to the owner to be heard, is unconstitutional, because it attempts to take his property without due process of law: *East Kingston v. Towle*, 48 N. H. 57; 2 Am. Rep. 174. A statute requiring a plank-road company to remove its toll-gate beyond municipal limits deprives the company of its property without due process of law, and is therefore invalid: *City of Detroit v. Detroit etc. P. R. Co.*, 43 Mich. 140. An act which provides that all roads which have been open and in common use twelve months previous to its passage shall be public roads, and not be changed, closed, or obstructed, is invalid, because it provides for the taking of property without due process of law: *Torres v. Falgout*, 37 La. Ann. 497. A municipal ordinance which makes it the duty of the tax collector to put the purchaser at a tax sale in possession of lands sold for taxes, and authorizes the mayor, if necessary, to direct the police to put him in possession, and which declares that the certificate given to such purchaser shall be evidence of a right to the possession of the premises therein specified, and of a right to retain them until redeemed as provided by the charter, and if the property is not redeemed within the time prescribed by the charter, shall operate as a deed of conveyance, violates the constitutional provision that no person shall be deprived of his property but by due process of law: *Calhoun v. Fletcher*, 63 Ala. 574. A statute providing that no convict shall be discharged from a state prison until he has remained the full term for which he was sentenced, excluding the time he may have been in solitary confinement for any violation of the rules and regulations of the prison, deprives him of his liberty without due process of law, and is therefore void: *Gross v. Rice*, 71 Me. 241. An act providing that any person charged with being an inebriate, habitual or common drunkard, shall be arrested and brought before a judge of a court of record for trial, and if convicted shall be sentenced to imprisonment or confinement in any inebriate or insane asylum for a period not exceeding two years nor less than three months, provided some relative or friend shall execute a bond of one thousand dollars that he will pay for the support of the inebriate during his confinement, violates the provision that no person shall be deprived of his liberty without due process of law: *State v. Ryan*, 70 Wis. 676. In the case of *Burke v. Mechanics' Savings Bank*, 12 R. I. 513, a mother built houses upon land belonging to her minor children. She then procured the legislature to pass an act authorizing her to mortgage the land to pay for the cost of building the houses. Subsequently the mortgage was foreclosed, and it was held that the children were deprived of their property without due process of law. A person imprisoned for refusing to appear or testify before a county attorney in a proceeding under the Kansas act prohibiting the manufacture and sale of intoxicating liquors is distrained of his liberty without due process of law: *In re Ziebold*, 23 Fed. Rep. 791. And the trial and commitment of one who has already been tried and acquitted of the same offense is a deprivation of liberty without due process of law: *Ex parte Ulrich*, 42 Fed. Rep. 587. And although a law which merely changes the remedy is not on that account unconstitutional, yet a law which takes away the right by refusing the remedy, except upon an impossible condition, deprives a party of his property

without due process of law, and is therefore unconstitutional and void: *Reynolds v. Randall*, 12 R. I. 522.

STATUTES HELD NOT TO DEPRIVE OF RIGHTS WITHOUT DUE PROCESS OF LAW. — A statute which provides that where an injury is done to a building or other property by a fire communicated by the locomotive of a railroad company, without contributory negligence on the part of the owner of the property, the company shall be responsible in damages, does not provide for the taking of the company's property without due process of law: *Grissell v. Housatonic R. R. Co.*, 54 Conn. 447. An act requiring every railroad corporation in the state to erect and maintain fences and cattle-guards on the sides of its road, and if it does not, making it liable in double the amount of the damages occasioned thereby, and done by its agents, cars, or engines, to cattle or other animals on its road, does not deprive the railroad company of its property without due process of law: *Missouri Pac. R'y Co. v. Humes*, 115 U. S. 512. Nor does a statute providing that every railroad company organized or doing business in the state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damages: *Missouri Pac. R'y Co. v. Mackey*, 127 U. S. 205. An act requiring railroad engineers to be examined and licensed by a board appointed by the governor of the state, and making it a misdemeanor for any engineer to operate an engine on any railroad without having been examined and duly licensed, does not deprive the citizen of any natural right without due process of law: *McDonald v. State*, 81 Ala. 279; 60 Am. Rep. 158. An act fixing a maximum charge for elevating, receiving, weighing, and discharging grain by floating and stationary elevators and warehouses does not deprive the owners of such elevators and warehouses of their property without due process of law: *Matter of Annon*, 50 Hun, 413; *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460. A statute authorizing a board of health to slaughter horses affected with glanders does not deprive the owners of such horses of their property without due process of law: *Newark etc. R'y Co. v. Hunt*, 50 N. J. L. 308. A statute providing for the execution by electricity of persons convicted of capital crimes does not deprive the convict of life without due process of law: *In re Kemmler*, 136 U. S. 436. Mr. Chief Justice Fuller, who delivered the opinion of the court in that case, discussing the question whether the act was in conflict with the fourteenth amendment to the constitution of the United States, said: "As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so in the Fourteenth Amendment, the same words refer to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

A statute prohibiting the manufacture and sale of intoxicating liquors within a state does not deprive persons of property without due process of law: *Mugler v. Kansas*, 123 U. S. 623. But in *Matter of Application of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, it was held that a statute making it a misdemeanor to manufacture cigars in cities of more than five hundred thousand inhabitants, in any tenement-house occupied by more than three families, except on the first floor of houses in which there is a store for the sale of cigars and tobacco, was unconstitutional, because it deprived the citizen of his prop-

erty without due process of law. A statute authorizing any person to erect and maintain on his own land a water-mill and mill-dam upon and across any stream not navigable, paying to the owners of lands flowed damages assessed in a judicial proceeding, does not deprive such owners of their property without due process of law: *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9. A statute authorizing the levying of an assessment for draining low or marshy lands does not deprive of property without due process of law: *Wurts v. Hoagland*, 114 U. S. 606. Nor does a statute clothing fence-viewers with jurisdiction to decide as to the sufficiency of a hedge, and to determine its value: *McKeever v. Jenks*, 59 Iowa, 300; nor a statute authorizing summary process against delinquent tax collectors and their sureties: *Weimer v. Bunbury*, 30 Mich. 201. A statute authorizing suits to be brought in the name of the state, on the written direction of the governor to the attorney, without giving bond or security or causing affidavit to be made, though the same may be required in actions between private citizens, does not dispense with due process of law: *Ex parte Macdonald*, 76 Ala. 603. An act authorizing a special administrator having charge of an estate pending a contest as to the validity of a will to have a final settlement of his accounts conclusive against the distributees, without giving notice to them, is not unconstitutional, or open to the objection that it deprives of property without due process of law. Such administrator is answerable to the executor who represents all the parties interested: *Robards v. Lamb*, 127 U. S. 58. A statute the effect of which is to deny to a municipal corporation the right to impose taxes to such an extent as to make it impossible to pay a judgment recovered against it for injuries done by a mob is not depriving the owner of a judgment of his property without due process of law: *Louisiana v. Mayor etc. of New Orleans*, 109 U. S. 285.

In *Freeland v. Williams*, 131 U. S. 405, it was held that a bill in equity to invalidate a judgment obtained against the defendant for a tort committed under military authority, in accordance with the usages of civilized warfare and as an act of public war, and also to enjoin its enforcement, is due process of law.

A perusal of the foregoing cases will assist in determining the question, What is due process of law?

LEWIS v. LEWIS.

[44 MINNESOTA, 124.]

KLEPTOMANIA IS NOT GROUND FOR ANNULMENT OF MARRIAGE, where the party afflicted by it is otherwise sane, and his or her mind is not so affected by this peculiar propensity as to be incapable of understanding or assenting to the marriage contract. A marriage contract will not be decreed void on the ground of the insanity of one of the parties unless there was, at the time of the marriage, such a want of understanding in such party as to render him or her incapable of assenting to the contract.

CONCEALMENT OF DEFECTS OF CHARACTER NOT GENERALLY GROUND FOR AVOIDING MARRIAGE. — Although a contract of marriage may be avoided when brought about by artifice and fraudulent practices, concealment or deception by one of the parties, in respect to traits or defects of character, habits, temper, reputation, bodily health, and the like, is not, generally speaking, sufficient ground for avoiding a marriage.

ACTION to annul a marriage. The opinion states the case.

J. M. Shaw and J. R. Corrigan, for the appellant.

VANDEBURGH, J. The statute in relation to divorces (Gen. Stats. 1878, c. 62, sec. 2) provides that "when either of the parties, . . . for want of age or understanding, is incapable of assenting thereto, . . . the marriage shall be void from the time its nullity is declared by a court of competent authority." Certain limitations are imposed by sections 4 and 5, as follows:—

"Sec. 4. Nor shall the marriage of any insane person be adjudged void after his restoration to reason, if it appears that the parties freely cohabited together as husband and wife after such insane person was restored to a sound mind."

"Sec. 5. No marriage shall be adjudged a nullity at the suit of the party capable of contracting, on the ground that the other party was . . . insane, if such . . . insanity was known to the party capable of contracting, at the time of such marriage."

There are no other provisions on the subject of insanity, and no form of insanity or insane delusion is included in the list of causes for divorce; and insanity arising subsequent to the marriage affords no ground for divorce. The section first quoted is simply declaratory of the common law. There must have been, at the time of the marriage, such want of understanding as to render the party incapable of assenting to the contract of marriage. The plaintiff applies for a decree of nullity on the ground of his wife's insanity at the time of his marriage, of which he claims to have then had no knowledge. The particular form of insanity alleged was a morbid propensity on the part of the wife to steal, commonly denominated "kleptomania." It was not proved, nor is it found by the court, that she was not otherwise sane, or that her mind was so affected by this peculiar propensity as to be incapable of understanding or assenting to the marriage contract. Whether the subjection of the will to some vice or uncontrollable impulse, appetite, passion, or propensity be attributed to disease, and be considered a species of insanity, or not, yet as long as the understanding and reason remain so far unaffected and unclouded that the afflicted person is cognizant of the nature and obligations of a contract entered into by him or her with another, the case is not one authorizing a decree avoiding the contract. Any other rule would open the door to great abuses: *Anonymous*, 4 Pick. 32; *St. George v. Bidde-*

ford, 76 Me. 593; *Durham v. Durham*, L. R. 10 P. D. 80. For a discussion upon the characteristics of the peculiar infirmity to which the defendant here is alleged to be subject, see 1 Wharton and Stillé's Med. Jur., 4th ed., secs. 591, 595. The cases are numerous in which contracts and wills have been upheld by the courts, though the party executing the same is subject to some peculiar form of insanity, so called, or is laboring under certain insane delusions: *In re Blakely's Will*, 48 Wis. 294; *Jenkins v. Morris*, L. R. 14 Ch. Div. 674; 11 Am. & Eng. Ency. of Law, 111, and cases.

2. The defendant is found to have been subject to this infirmity at the time of her marriage with plaintiff, in 1882, but it was concealed and kept secret from the plaintiff by her and her relatives, and was not discovered by him until 1888. As before suggested, if it had developed after the marriage, the plaintiff would not have been entitled to judicial relief, though the consequences might have been equally serious to him. But the plaintiff contends that such concealment constituted a case of fraud, such that the court should declare the contract of marriage void on that ground. Where one is induced, by deception or stratagem, to marry a person who is under legal disability, physical or mental, the fraud is an additional reason why the unlawful contract should be annulled. And so deception as to the identity of a person, artful practices and devices, used to entrap young, inexperienced, or feeble-minded persons into the marriage contract, especially when employed or resorted to by those occupying confidential relations to them, and where the contract is not subsequently ratified, are proper cases for the consideration of the court. But, generally speaking, concealment or deception by one of the parties in respect to traits or defects of character, habits, temper, reputation, bodily health, and the like, is not sufficient ground for avoiding a marriage. The parties must take the burden of informing themselves, by acquaintance and satisfactory inquiry, before entering into a contract of the first importance to themselves and to society in general: *Reynolds v. Reynolds*, 3 Allen, 605; *Leavitt v. Leavitt*, 13 Mich. 452; 1 Cooley's Bla. Com. 439, and notes. The facts found do not present a case warranting the relief asked.

Judgment affirmed.

MARRIAGE AND DIVORCE. — For the law relating to marriages of insane persons, idiots, etc., see note to *Gathings v. Williams*, 44 Am. Dec. 55, 56. Mental unsoundness, to avoid a contract of marriage, must be sufficient in

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degree, as it is not every unsoundness of mind that will avoid the contract: *Cole v. Cole*, 5 Sneed, 57; 70 Am. Dec. 275. Neither occasional paroxysms nor hereditary insanity before marriage, unknown to complainant, is a good ground for divorce: *Hamaker v. Hamaker*, 18 Ill. 137; 65 Am. Dec. 705, and note 708-726, upon the statutory grounds for a divorce in the various states and territories.

NAPA VALLEY WINE CO. v. BOSTON BLOCK CO.

[44 MINNESOTA, 130.]

INJUNCTION NOT GRANTED TO RESTRAIN VIOLATION OF CONTRACT TO WHICH DEFENDANT IS NEITHER PARTY NOR PRIVY. — Where the owner of a block leases a portion thereof to a lessee, with an agreement not to let any other portion of the block for the same purpose, such lessee will not be entitled to an injunction to restrain subsequent lessees of other portions of the block from the enjoyment of their lease, they being neither parties nor privies to the former contract.

ACTION for an injunction. The opinion states the case.

J. L. Dobbin, for the appellant.

E. C. Chatfield, for the respondent.

DICKINSON, J. This is an appeal by the plaintiff from a judgment rendered for the defendant upon the pleadings. The purpose of the action is to have the defendants enjoined from selling intoxicating liquors in a building called the "Boston Block," in the city of Minneapolis. Only the sufficiency of the complaint to entitle the plaintiff to such relief is to be considered. The following is, in substance, the case presented by the complaint:—

Prior to September, 1887, one Whitten was the owner of the Boston Block, and of a building contiguous thereto, designated as "Number 308 Hennepin Avenue." Through his agent he entered into negotiations with Scrimgeour and Gross, copartners engaged in the business of selling wines and liquors, for leasing to them the building No. 308, for the purposes of their business. A lease was formally executed July 12, 1887, for the term of three years from the first day of August following. In the course of the negotiations for the lease, Scrimgeour and Gross, by letter to Whitten's agent, proposed, as a condition of the lease, that the lessor should not rent any part of the Boston Block for the sale of intoxicating liquors. An answer was returned, also by letter, the import of which may be deemed to be an acceptance of that condition. At the time of the executing of the lease, these letters were, by the agreement of

the parties, attached to one of the copies of the lease, which was executed in duplicate, as a part thereof. In September, 1887, Whitten sold the Boston Block and the adjoining building, No. 308, to this defendant, the Boston Block Company, a corporation, and the latter has since regularly collected the rent accruing under the lease. In May, 1888, the lessees of the building No. 308 assigned to this plaintiff, a corporation, which has since then continued to carry on the business of the original lessees. In April, 1889, the Boston Block Company, having notice of the condition above referred to, leased the basement of the Boston Block to the defendants the Germania Brewing Company and Peter Zahnen, to be used for the sale of intoxicating liquors, and the premises have ever since been used for that purpose.

The relief sought necessarily involves the restraining of the defendants the Germania Brewing Company and Peter Zahnen from using the premises held by them in the Boston Block, under the lease from the Boston Block Company, for the sale of intoxicating liquors. A sufficient reason why those defendants should not be enjoined from this lawful use of the leased premises is the fact that they were not legally affected by the contract stated in the complaint to have been made between the plaintiff's assignors and Whitten. They were not parties nor privies in respect to that contract. Even if their lessors had become legally obligated by contract with other parties not to let those premises for such purposes, that did not concern the defendants the brewing company and Zahnen. The alleged agreement of the lessor, in connection with the lease of the building No. 308, not to let the other premises for a like purpose, did not charge the estate, the Boston Block, with that restriction in respect to its use so as to affect the rights of lessees of the latter premises.

Judgment affirmed.

INJUNCTION, WHEN PROPER. — An injunction will lie at the request of a lessee who claims the exclusive right to carry on a particular business upon the leased premises, to restrain another lessee, having notice of complainant's right, from so using his own rented premises as wrongfully to disturb such right; *Clay v. Powell*, 85 Ala. 538; 7 Am. St. Rep. 70.

PETERSON v. HOMAN.

[44 MINNESOTA, 166.]

WORD "AGENT" OR "TRUSTEE," AFFIXED TO NAME OF PARTY TO CONTRACT, PRIMA FACIE DESCRIPTIVE ONLY. — Where a person signs a contract, affixing to his name the word "agent," "trustee," or the like, he is *prima facie* individually liable. In order to show that he contracted in a representative capacity, he must prove the existence of that capacity.

ACTION on a guaranty of payment of a note. The opinion states the case.

James A. Kellogg, for the appellant.

Christensen and Tuttle, for the respondent.

GILFILLAN, C. J. Action on a guaranty of payment of a note expressed to be "for value received," and signed by defendant "J. S. Homan, trustee for Samuel De Haven." The answer alleged that there was no consideration for the guaranty, and that it was signed upon the express agreement that defendant should not be personally liable on it, but that he should be liable only as trustee of De Haven, under a deed of trust described in the answer. The reply alleges that the guaranty was executed in consideration that plaintiff released his right to a mechanic's lien on real estate in which defendant had an interest, denies any agreement that defendant should be liable only as trustee, and alleges that he was to be liable personally. The issues were thus narrowed down to these: Was the guaranty executed in consideration of plaintiff executing the release? And did the defendant execute it in his individual capacity, or in his capacity as trustee under the deed of trust? On the trial the release was proved, and from the defendant's own testimony, given with evident reluctance and effort to evade, it was manifest that the guaranty and release, though not executed contemporaneously, were executed each in consideration of the other. Of course that showed a valid consideration for the guaranty.

It was held in *Pratt v. Beaupre*, 13 Minn. 177 (187), that where words, such as "agent," "trustee," or the like, are affixed to the name of a party to a contract, which may be either descriptive of the person or indicative of the character in which he contracts, they are *prima facie* descriptive only, but that it may be shown by extrinsic evidence that they were understood as determining the character in which he contracted.

The rule has been followed in *Bingham v. Stewart*, 14 Minn. 153 (214), and *Deering v. Thom*, 29 Minn. 120. It was also decided in *Pratt v. Beaupre*, 13 Minn. 177 (187), that when the word "agent" is affixed to the party's name, in order to show that he contracted as agent, he must prove the fact of agency. In other words, in order to show that he contracted in a representative capacity, he must first prove the existence of that capacity. The reason for that is apparent. The evidence is admitted, not to defeat the contract, but to show who is liable upon it, — whose contract it is.

The defendant offered in evidence the deed of trust described in his answer, and on objection by plaintiff, it was excluded. Had it been admitted, it would not have established defendant's character as trustee, so far as in any way affected the note guaranteed by him, nor authority in him to pay or guarantee the note. The trust deed authorized him to collect the rents of a certain building, and apply them to pay certain persons named (the plaintiff not being among them) the amounts of certain notes described, that here in controversy not being among them. It was properly excluded. And his capacity as trustee not being shown, defendant was liable on the guaranty.

We do not deem it necessary to refer in detail to the many assignments of error. If in any of the rulings upon which they are founded there was technical error, it could not have affected the result.

Order affirmed.

AGENCY — LIABILITY OF AGENT ON A CONTRACT SIGNED BY HIM AS AGENT. — An agent is personally liable upon a contract signed in his own name, notwithstanding the fact that he affixes thereto the designation "agent": *Hobson v. Hassett*, 76 Cal. 203; 9 Am. St. Rep. 193, and note. See also *Tarver v. Garlington*, 27 S. C. 107; 13 Am. St. Rep. 628, and note 631, 632, as to the effect of the word "agent" affixed to a signature. An executor, trustee, or agent who contracts in his own name, adding thereto the word "executor," "trustee," or "agent," is personally liable on the contract, the word added being merely *descriptio personæ*: *Carr v. Branch*, 85 Va. 597.

NATIONAL BANK OF COMMERCE v. CHICAGO, BURLINGTON, AND NORTHERN R. R. Co. SAME v. WISCONSIN CENTRAL Co. CHICAGO, BURLINGTON, AND NORTHERN R. R. Co. v. L. T. SOWLE ELEVATOR Co. WISCONSIN CENTRAL Co. v. SAME.

[44 MINNESOTA, 224.]

CHECK ON BANK IS NOT PAYMENT, but is only so when the cash is received on it; and there is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor.

RIGHT OF SELLER PAID BY CHECK TO RETAKE GOODS SOLD FOR CASH WHEN CHECK IS DISHONORED. — Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods, also, is only conditional; and if the check on due presentment is dishonored, the vendor may retake the goods, even from an innocent subvendee for value, unless the original vendor has been guilty of such fraud or laches as will create an equitable estoppel against him.

DEFENSE THAT GOODS WERE TAKEN FROM CARRIER BY TRUE OWNER. — In an action against a carrier for the non-delivery of goods, it is a good defense, even against an innocent indorsee of the bill of lading, that the property was taken from his possession by one having a paramount title.

BILL OF LADING ISSUED BY CARRIER FOR GOODS NOT RECEIVED DOES NOT ESTOP. — A bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and the carrier is not estopped by the statements in such bill from showing that no goods were in fact received for transportation.

MINNESOTA STATUTE MAKING BILLS OF LADING NEGOTIABLE does not put them on the footing of bills of exchange, but merely makes the transfer and delivery of these symbols of property, in the mode therein prescribed, equivalent, for certain purposes, to an actual transfer and delivery of the property itself.

THE opinion states the facts.

Young and Lightner, for the Chicago etc. R. R. Co.

Lusk and Bunn, for the Wisconsin Central Company.

Jackson and Atwater, for the National Bank of Commerce.

Hart and Brewer, for the L. T. Sowle Elevator Company.

MITCHELL, J. All of these actions grew out of the same transaction, and involve the same state of facts. They were all determined in the court below upon the same point, viz., the delivery by the defendant elevator company, as vendor, to Moak & Co., as vendees, of certain wheat, the value of which

is the subject of the actions. All four appeals may therefore for convenience be considered together.

The first and main question to be considered is, whether there had been such a delivery of the wheat in question by the elevator company to Moak & Co. as to pass the title absolutely to the latter. The undisputed facts are substantially these: The defendant elevator company, which appears to have been in the business of buying, selling, and shipping grain, owned and operated a grain-elevator in Minneapolis. There were three tracks from the Manitoba railroad to this elevator, designed for the use of the elevator company in its business. One of these ran through the elevator, and was on the ground of the elevator company. The other two, outside the elevator, belonged to the Manitoba company, which acted as agent of the other railway companies in switching all their cars to and from the elevator, for which they charged a certain sum per car. The same person, one Dudgeon, acted as the agent of all three railway companies. The two outside tracks referred to were used exclusively for the business of the elevator, unless some special emergency temporarily required some other use. The usual and invariable course of business between the elevator company and the railway companies, as to all cars loaded out of the elevator and placed on these tracks, had been for the elevator company to "card" the cars and give the railway agent the "switch bills" or "shipping orders," and without such switching orders from the elevator company the agent never removed the cars from the Manitoba tracks. This had been the course of business as to all shipments by the elevator company for Moak & Co., the former giving the railway agent a "switch bill," after Moak & Co. had paid for the grain. The elevator company had made certain executory contracts with Moak & Co. for the sale of large quantities of wheat of a specified grade. By the express terms of these contracts, the sales were to be for cash on delivery of the wheat free on board the cars at the elevator. Large deliveries had already been made on these contracts, in all of which the terms concerning cash payment on delivery had been strictly insisted upon and enforced.

On the occasion now under consideration, Moak & Co. notified the elevator company that they desired to ship four cars of the wheat contracted for, — two by each of the railway companies, parties to these actions. Thereupon the elevator company ordered the four cars — two of each company — to

be switched into its elevator, and there loaded them with wheat of the specified grade (which was weighed and inspected by the state officers), and then caused them to be moved by a Manitoba switch-engine out from the elevator, and onto one of the tracks devoted to the use of the elevator business, and there left them standing. This loading was finished on September 14th, and on the same day the elevator company sent written notice to Moak & Co. that they had loaded the cars on their account, giving the number of each car and the weight and grade of its contents

Nothing further appears to have been done until September 17th, when the elevator company sent a bill of the wheat to Moak & Co., who gave a check for the amount on their bank, whereupon the elevator company receipted the bill, and delivered it to Moak & Co. On the same day, Moak & Co. gave shipping orders to the railway agent, and obtained from him bills of lading of the wheat, naming themselves as consignors, and certain parties in Wisconsin and Illinois as consignees, and immediately, or at least the same day, drew their drafts on the consignees, which they sold to the plaintiff bank for value, with the bills of lading attached as security. These drafts were duly presented, but never paid. The elevator company never "carded" the cars, or gave the railway agent any "switch bill" or "shipping orders." The judge who tried the bank cases finds that Moak & Co. obtained the bills of lading from the railway companies upon presentation of the receipted bill of the wheat from the elevator company; but this is unsupported by evidence, as there is not a particle of testimony that the railway agent ever saw or knew of the existence of this receipted bill. So far as the railway companies were concerned, the first time Moak & Co. ever appeared in connection with this wheat was when they applied for and received the bills of lading. Why, or under what circumstances, the railway agent took shipping orders from Moak & Co., instead of from the elevator company, in accordance with the usual course of business, is left wholly unexplained. On the same day (September 17th) on which the elevator company received the check from Moak & Co. it deposited it with its banker. This check, according to the usual course of business, passed through the clearing-house, and on the 18th, near noon, was presented at Moak & Co.'s bank for payment, which was refused for want of funds. It appears that on the 17th, Moak & Co. had in bank sufficient funds to pay the

check, but that they had drawn them out on the morning or forenoon of the 18th, before the check was presented. However, no claim is made that there was any undue delay in presenting the check. On being notified of the dishonor of the check, the elevator company immediately, and on the afternoon of the 18th, caused the four cars (which still stood where they had been placed on the 14th) to be run back into the elevator, and there unloaded them, claiming the right to do so as unpaid vendor. The bank, claiming the wheat under the bills of lading, sued the railway companies for its non-delivery, and recovered, whereupon the railway companies sued the elevator company for the wrongful taking of the wheat, and also recovered. In the bank cases, which were tried together, the court found that there had been a delivery of the wheat by the elevator company to Moak & Co., by which the title passed to the latter. In the cases against the elevator company, which were also tried together, the court directed verdicts for the plaintiffs, upon the ground, evidently, that, in his opinion, the evidence showed conclusively that there had been such a delivery. But as the facts are undisputed, and, in our opinion, present a mere question of law, the difference in the manner in which the cases were disposed of is unimportant. In the bank cases, the court did not pass upon the question of the effect of the bills of lading upon the liability of the railway companies, but rested its decision entirely upon the delivery of the wheat by the elevator company to Moak & Co.

In the briefs of counsel, it is stated that the question in the cases is, whether there had been a "delivery" of the wheat by the elevator company to Moak & Co. So general a statement is, we think, both inaccurate and misleading. The word "delivery" is used in different senses, and acts and facts may be sufficient to constitute a delivery for one purpose, and not for another purpose. It is not every kind of delivery that will deprive a vendor of the right to retake goods for non-payment of the purchase-money. Where goods are sold for cash, delivery and payment are concurrent conditions, and a delivery in expectation of immediate payment is conditional only; and if payment is not made as agreed, the vendor may reclaim the goods. Hence the real question in these cases is, whether there was an unconditional delivery of the wheat to Moak & Co.; or, otherwise expressed, did the elevator company waive the condition of cash payment on delivery, or

accept the check as absolute payment? It had the undoubted right to waive this condition, also to waive payment in cash, and accept the check as unconditional payment; but we fail to find anything in the facts to support any such conclusion. Nothing is better settled than that a check is not payment, but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Where payment is made by check drawn by a debtor on his banker, this is merely a mode of making a cash payment, and not giving or accepting a security. Such payment is only conditional, or a means of obtaining the money. In one sense, the holder of the check becomes the agent of the drawer to collect the money on it; and if it is dishonored, there is no accord and satisfaction of the debt: 2 Parsons on Contracts, 623; Benjamin on Sales, sec. 731; *Brown v. Leckie*, 43 Ill. 497; *Woodburn v. Woodburn*, 115 Ill. 427; *Cromwell v. Lovett*, 1 Hall, 56. Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also only conditional; and if the check, on due presentation, is dishonored, the vendor may retake the goods: *Hodgson v. Barrett*, 33 Ohio St. 63; 31 Am. Rep. 527. Conceding, for the sake of argument, that there was in this case a constructive delivery of the wheat contemporaneously with the receipt of the check, there is an entire absence of evidence to rebut the presumption that it was only conditional upon the check being paid on presentation. Therefore, upon the dishonor of the check, the right of the elevator company to retake the wheat still continued in full force.

Much stress is laid by counsel, and apparently by the trial court, upon the facts that the elevator company had loaded the wheat into cars of the carriers designated by Moak & Co., and had placed the cars upon the tracks of the Manitoba company. It is urged that this amounted to a delivery of the wheat to the railway companies, who thereafter held possession as agents of Moak & Co., for transportation; that the matter of "carding" the cars, and furnishing the railway agent with "switch bills," is not material upon the question of possession; that these things being done after the cars were on the tracks, their only purpose was to furnish the Manitoba company with vouchers for its switching charges. But it

seems to us that this is putting an erroneous interpretation upon the acts of the elevator company, in view of the customary manner of doing business between it and the railway companies. Undoubtedly, in furnishing cars to be loaded, and in furnishing these tracks on which to place them after being loaded, the railway companies anticipated that the grain would be delivered for transportation over their roads; and in loading the cars, and setting them out on the tracks specially designed for its business, the elevator company doubtless anticipated the future delivery of this wheat to Moak & Co., and its shipment on their account, and had that end in view. But until the elevator company turned the wheat over to Moak & Co., or turned it over to the railway companies for transportation on account of Moak & Co., the property was still as much in its possession as when in the elevator. All that was done merely amounted to its storing its wheat in the railway cars, and on the railway tracks designed for that purpose, preparatory to its shipment or its delivery to the vendees. Until the elevator company turned over control of it to the railway companies for transportation, or to Moak & Co., no one but it, not even the railway companies, had any right to ship out the wheat. The business of the elevator could not be safely conducted on any other basis.

It is clearly evident that the giving of "switch bills" by the elevator company to the railway agent had a double, or perhaps treble, purpose: 1. To furnish the Manitoba company with vouchers for its switching charges; 2. To furnish the agent of the railway companies with evidence of authority of the elevator company to ship the wheat; and 3. To furnish him with directions whither and to whom to ship it. It seems to us perfectly clear that, at least up to the 17th, this wheat was in the actual possession and control of the elevator company, and that if there was any delivery of any kind to Moak & Co. on that day on the receipt of their check, it was only conditional on the check being paid on presentation; and therefore, when the check was dishonored, the elevator company had an undoubted right to retake or retain the wheat, whichever it may be termed.

It is urged that a different rule applies where, intermediately, the property has been purchased by an innocent subvendee for value. The general rule is, that a title, like a stream, cannot rise higher than its source, and it is difficult to see how a person can communicate a better title than he himself has,

unless some principle of equitable estoppel comes into operation against the person claiming under what would otherwise be the better title. We have found no case holding that any different rule obtains in cases like the present, as to a subvendee, than as to the original purchaser, except, perhaps, that, as to the former, a waiver of the condition, as, for example, of payment on delivery, will be more readily inferred from the delivery, especially when the condition is not express, but implied: See Benjamin on Sales, Am. note, 269; *Coggill v. Hartford and New Haven R. R. Co.*, 3 Gray, 545; *Hirschorn v. Canney*, 98 Mass. 149; *Armour v. Pecker*, 123 Mass. 143. It is suggested that General Statutes of 1878, chapter 39, section 15, would apply, and that any condition attached to the delivery would be void as against creditors and purchasers, unless the contract is filed. This statute may establish such a rule as to conditional sales, properly so called, where the condition is that the title is to pass, not upon delivery, but upon payment at some subsequent date. But it can have no application to a case like the present, where the terms of sale are cash on delivery, and the only condition attached to the delivery arises from the fact that payment by check is conditional. In such a case, if the check is dishonored, the vendor, if guilty of no fraud or laches which create an equitable estoppel against him, may retake the property, even from an innocent subvendee for value. We are not called upon to decide what would have been the effect if any one had dealt with the wheat in reliance upon the acknowledgment of the elevator company, in the receipted bill, that it had been paid for, for there is no evidence that such was the fact. But it is difficult to see how any negligence or laches can be ascribed to the act of a vendor giving his vendee a receipted bill of the goods upon receiving his check on his banker, which the vendor has every reason to suppose will be paid on presentation: See *Zuchtmann v. Roberts*, 109 Mass. 53; 12 Am. Rep. 663.

The evidence, therefore, did not justify the conclusion of the trial judge in the bank cases, that there had been a delivery of the wheat so as to pass the title absolutely to Moak & Co., and *a fortiori* it did not justify the direction of verdicts for the plaintiffs in the cases against the elevator company. Whether the evidence would have justified a finding that there was a constructive delivery at the time the check was taken and the bill receipted, it is unnecessary to decide, for if there was, it could only have been, as already stated, a

conditional delivery, which did not deprive the elevator company of the right to retake the wheat upon the dishonor of the check. There must be a new trial, at least in the cases against the elevator company.

It only remains to consider, in the bank cases, the effect of the bills of lading upon the liability of the railway companies to the bank in case no wheat was in fact ever delivered to them for transportation. Of course, if the wheat was delivered by the elevator company to Meak & Co., and by the latter to the railway companies for transportation, and the agent of the railway companies in good faith issued the bills of lading, the railway companies would not be liable; for it is always a good defense to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its possession by one having a paramount title, as was the title of the elevator company in this case as unpaid vendor. A carrier, in issuing a bill of lading for property delivered to him for transportation, does not warrant the title of the shipper. But what is the rule where no property was ever delivered at all for transportation, and the agent of the carrier, either fraudulently or through mistake or negligence, issues a false bill of lading, which passes into the hands of a *bona fide* consignee or indorsee for value? There is an unbroken line of authorities in England that, even as against a *bona fide* consignee or indorsee for value, the carrier is not estopped by the statements of the bill of lading issued by his agent from showing that no goods were in fact received for transportation: *Grant v. Norway*, L. R. 10 Com. B. 665; *Coleman v. Riches*, L. R. 16 Com. B. 104; *Hubbersty v. Ward*, L. R. 8 Ex. 330; *Brown v. Powell Coal Co.*, L. R. 10 Com. P. 562; *McLean v. Fleming*, L. R. 2 H. L. S. 128; *Cox v. Bruce*, L. R. 18 Q. B. Div. 147; *Meyer v. Dresser*, L. R. 16 Com. B., N. S., 646; *Jessel v. Bath*, L. R. 2 Ex. 267. And this has not been at all changed by the Bills of Lading Act: 18 & 19 Vict., c. 111, sec. 3. It is also the settled doctrine of the federal courts: *Schooner Freeman v. Buckingham*, 18 How. 182; *The Lady Franklin*, 8 Wall. 325; *Pollard v. Vinton*, 105 U. S. 7; *St. Louis etc. R'y Co. v. Knight*, 122 U. S. 79; *Friedlander v. Texas etc. R'y Co.*, 130 U. S. 416. What was said on the subject in *Schooner Freeman v. Buckingham*, 18 How. 182, was probably *obiter*, for in that case it was sought to hold the interest of the general owner in a ship liable on a bill of lading issued by the special owner, who was not the agent of the former. But what is there said is

important both as being the utterance of so eminent a jurist as Curtis, J., and also because so often quoted with approval by the same court in subsequent cases. The case of *The Lady Franklin*, 8 Wall. 325, did not involve the question of a *bona fide* purchaser, but is important as announcing that the principle is the same, whether the false bill of lading is issued fraudulently or by mistake. But in view of the later cases cited above, there is no room to doubt that that court is firmly committed to the doctrine in its broadest scope. The same rule obtains in Massachusetts, Maryland, Louisiana, Missouri, North Carolina, and, apparently, Ohio: *Sears v. Wingate*, 3 Allen, 103; *Baltimore etc. R. R. Co. v. Wilkens*, 44 Md. 11; 22 Am. Rep. 26; *Fellows v. Steamer Powell*, 16 La. Ann. 316; 79 Am. Dec. 581; *Hunt v. Mississippi Central R. R. Co.*, 29 La. Ann. 446; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380; *Williams v. Wilmington etc. R. R. Co.*, 93 N. C. 42; *Dean v. King*, 22 Ohio St. 118. The text-writers all agree that the overwhelming weight of authority is on this side: See note to *Chandler v. Sprague*, 38 Am. Dec. 410.

The reasoning by which this doctrine is usually supported is, that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority — i. e., the power with which his principal has clothed him in the character in which he is held out to the world — is the same, viz., to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the

contingency, or the performance of the condition must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. . An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively, or merely by mistake.

The only states that we have found in which a contrary rule has been adopted are New York, Kansas, Nebraska, apparently Illinois, and perhaps Pennsylvania: *Armour v. Michigan Central R. R. Co.*, 65 N. Y. 111; 22 Am. Rep. 603; *Bank of Batavia v. New York etc. R. R. Co.*, 106 N. Y. 195; 60 Am. Rep. 440; *Sioux City & Pac. R. R. Co. v. First Nat. Bank*, 10 Neb. 556; 35 Am. Rep. 488; *St. Louis and Iron Mt. R. R. Co. v. Larned*, 103 Ill. 293; *Brooke v. New York etc. R. R. Co.*, 108 Pa. St. 529; 56 Am. Rep. 235. The reasoning of these cases is, in substance, that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel *in pais*; that where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person who has dealt with the agent or acted on his representation in good faith, in the ordinary course of business. This rule this court, in effect, adopted and applied in *McCord v. Western Union Tel. Co.*, 39 Minn. 181; 12 Am. St. Rep. 636. It is urged that force is added to this reasoning in view of the fact that bills of lading are viewed and dealt with by the commercial world as *quasi* negotiable, and consequently it is desirable that they should be viewed with confidence, and not distrust; and that for these considerations it is better to cast the risk of the goods not having been shipped upon the carrier who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or indorsee, who, as a rule, has no means of ascertaining the fact.

If the question was *res integra*, we confess that it seems to us that this argument would be very cogent. But on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property; and that if the statements

in the receipt part of bills of lading issued by any of their numerous station or local agents are to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law the federal courts refuse to follow the decisions of the state courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the state courts should conform to the doctrine of the federal courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the federal courts and another in the state courts, is of itself almost a sufficient reason why we should adopt the doctrine of the federal courts on this question. To do otherwise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens. In deference, therefore, to the overwhelming weight of authority, but without committing ourselves to all the reasoning of the decided cases on the subject of the law of agency, we deem it best to hold that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the rule is the same whether the act of the agent was fraudulent and collusive or merely the result of mistake. Of course this presumption is predicated upon the assumption that the authority of the agent is limited to issuing bills of lading for freight received before or concurrent with the issuing of the bills, which would be the presumption in the absence of evidence to the contrary. No doubt a carrier might adopt a different mode of doing

business by giving his agents authority to issue bills of lading for goods not received, so as to render him liable in such cases to third parties.

In each of the first two cases the judgment, and in each of the last two, the order appealed from is reversed, and in each of the four cases a new trial is directed.

Ordered accordingly.

In response to a motion for a reargument, the following opinion was filed:—

MITCHELL, J. The plaintiff in these actions asks for a reargument, on the ground that counsel and the court overlooked General Statutes of 1878, chapter 124, section 17, which provides that bills of lading or receipts for any goods, wares, merchandise, etc., when in transit by cars or vessels, "shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading; and any person to whom the said receipt or bill of lading may be transferred shall be deemed and taken to be the owner of the goods, wares, or merchandise therein specified," etc. This statute was not called to our attention upon the argument, but an examination of it upon this motion satisfies us that it has no bearing upon the questions involved in these cases. It was not intended to totally change the character of bills of lading, and put them on the footing of bills of exchange, and charge the negotiation of them with the consequences which attend or follow the negotiation of bills or notes. On the contrary, we think the sole object of the statute was to prescribe the mode of transferring or assigning bills of lading, and to provide that such transfer and delivery of these symbols of property should for certain purposes be equivalent to an actual transfer and delivery of the property itself: See *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557.

We cannot see that section 471 of the Penal Code, cited in the petition for reargument, has any bearing whatever on the cases. The petition for reargument is therefore denied.

PAYMENT—CHECK. — As to whether the giving of a check upon a bank constitutes payment, see note to *Hemphill v. Yerkes*, 19 Am. St. Rep. 609–612; *Born v. First National Bank*, 123 Ind. 78; 18 Am. St. Rep. 312, and note.

BILLS OF LADING. — AS TO THE NEGOTIABILITY OF BILLS OF LADING, see *Douglas v. People's Bank*, 86 Ky. 176; 9 Am. St. Rep. 276, and note; *Weyand v. Atchison etc. R'y Co.*, 75 Iowa, 573; 9 Am. St. Rep. 504.

BILLS OF LADING, CONCLUSIVENESS OF: See *Gulf etc. R'y Co. v. Dwyer*, 75 Tex. 572; 16 Am. St. Rep. 926. A bill of lading is both a receipt and a contract. As a receipt, it may be contradicted by parol testimony: *Chapin v. Chicago etc. R'y Co.*, 79 Iowa, 582. The Mississippi statutes provide that a bill of lading shall be conclusive evidence in the hands of a *bona fide* holder against the person or corporation issuing it that the property mentioned therein was actually received for shipment: *Hazard v. Illinois C. R. R. Co.*, 67 Miss. 32. In *Sioux City etc. R. R. Co. v. First Nat. Bank*, 10 Neb. 556, 35 Am. Rep. 488, it is decided that a carrier is estopped, as against a *bona fide* purchaser, to deny a bill of lading issued by its authorized agent, even though the goods were not received by the company. But see *Witzler v. Collins*, 70 Me. 290, 35 Am. Rep. 327, wherein it was decided that, as between the parties to a bill of lading, evidence is admissible on the part of the carrier to contradict the bill.

BILL OF LADING. — As to the title which the holder of bill of lading acquires, see *First Nat. Bank v. Ege*, 109 N. Y. 120; 4 Am. St. Rep. 431; note to *Bank of Rochester v. Jones*, 55 Am. Dec. 299, 300. See extended note to *Chandler v. Sprague*, 38 Am. Dec. 407-426, upon the law relating to bills of lading, generally.

SALES — STOPPAGE IN TRANSITU. — As to when and under what circumstances a vendor may exercise the right of stoppage *in transitu*, see *Farrell v. Richmond etc. R. R. Co.*, 102 N. C. 390; 11 Am. St. Rep. 760, and note 766, 767; *Allen v. Maine C. R. R. Co.*, 79 Me. 327; 1 Am. St. Rep. 310, and note 312-314; note to *Sangslaff v. Stitz*, 60 Am. Rep. 51-57; note to *Rucker v. Donovan*, 19 Am. Rep. 87-92; note to *Hause v. Judson*, 29 Am. Dec. 384-394.

WARREN v. WESTRUP.

[44 MINNESOTA, 237.]

DAMAGES FOR WILLFUL JOINT TRESPASS, HOW ESTIMATED. — In an action to recover damages for a willful joint trespass, the jury should estimate the damages against all the guilty defendants according to the amount which they think the most culpable should pay; but where the jury have improperly apportioned and severed such damages between the defendants, the plaintiff may cure the irregularity by entering a *nolle prosequi* as to all but one, taking judgment against him only.

ACTION for assault and battery. The opinion states the facts.

R. M. McClelland and H. J. Peck, for the appellant.

Willis and Nelson, and F. R. Allen, for the respondent.

COLLINS, J. From the order made by the trial court, whereby it set aside the verdict herein, it appears that in an action brought against several persons to recover damages for an assault and battery, the jury returned a verdict in plaintiff's favor against two, but undertook to apportion the amount thereof

by assessing about four fifths of the total against respondent, Westrup, and the remainder against a co-defendant, Fink. As against the latter, plaintiff dismissed his action and remitted the verdict immediately upon its rendition. Thereupon the respondent moved the court to set aside and vacate the verdict as to him. This being done, upon the ground that having remitted as to a co-defendant the verdict could not be sustained as to Westrup alone, plaintiff appeals. The court below was in error, and its order must be reversed. In cases of this character the question is, What damages have been sustained by the injured party? and for the full amount of these damages each of the participants in the tort is liable. There can be no degrees of culpability as between joint wrong-doers, and joint or entire damages must be assessed. All of the legal consequences of being jointly guilty must necessarily follow, one being that each is liable for all the damages: *Halsey v. Woodruff*, 9 Pick. 555; *Beal v. Finch*, 11 N. Y. 128; *Currier v. Swan*, 63 Me. 323. The plaintiff could have maintained his action against either, or a part, or against all, of the persons engaged in the trespass. As the action is several as well as joint, and as the plaintiff could have originally proceeded against Westrup solely, holding him for the full amount, so after the verdict he had a right to elect to take the damages awarded from the respondent alone. It is well settled that the jury should estimate the damages against all guilty defendants according to the amount which they think the most culpable should pay; but where a jury have improperly apportioned and severed such damages between defendants, the plaintiff may cure the irregularity by entering a *nolle prosequi* as to all but one, taking judgment against him only: *Mitchell v. Milbank*, 6 Term Rep. 199; *Salmon v. Smith*, 1 Saund. 206; *Dale v. Eyre*, 1 Wils. 306; *Fleming v. Langton*, 1 Strange, 532; 3 Bac. Abr., tit. Damages, 4; 1 Tidd's Practice, 682; 1 Sutherland on Damages, 825; 2 Sedgwick on Damages, 7th ed., 624; *Allen v. Craig*, 13 N. J. L. 294; *Crawford v. Morris*, 5 Gratt. 90; *Rochester v. Anderson*, 1 Bibb, 439; *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702. The respondent cannot complain of the dismissal, for there is neither indemnity nor contribution as between those who engage in a known and meditated wrong: *Spalding v. Oakes*, 42 Vt. 343; *Churchill v. Holt*, 131 Mass. 67; 41 Am. Rep. 191; *Bailey v. Bussing*, 28 Conn. 455; *Miller v. Fenton*, 11 Paige, 18; *Arnold v. Clifford*, 2 Sum. 238.

Order reversed.

JOINT TRESPASSERS. — There can be no joint trespass unless there has been command, advice, or encouragement to the actual trespasser, or concert or co-operation in the commission of the trespass, or subsequent ratification of the trespass committed by another for the benefit of him who ratifies it: *Torrey v. Schneider*, 74 Tex. 117; *Lang v. Dougherty*, 74 Tex. 227.

Joint trespassers are jointly and severally liable: *Loftus v. Marey*, 73 Tex. 242; *Markham v. Houston etc. Co.*, 73 Tex. 247. The benefit of the plea and evidence by one joint trespasser as to mitigation of damages should extend to his co-trespassers, where only one act of trespass was committed: *Bowman v. Davis*, 13 Col. 297. A complaint against a husband and wife for joint trespass need not allege their marital relation: *Waters v. Dumas*, 75 Cal. 563.

In an action for joint trespass, the jury cannot ordinarily assess the damages severally against each trespasser: *St. Louis etc. R. R. Co. v. South*, 43 Ill. 176; 92 Am. Dec. 103. But in South Carolina and Kentucky the damages in such actions may be severed and apportioned, according to the degree of culpability of each trespasser: *Smith v. Singleton*, 2 McMull. 184; 39 Am. Dec. 122; *Central P. R'y Co. v. Kuhn*, 86 Ky. 578; 9 Am. St. Rep. 309; *Alexander v. Humber*, 86 Ky. 565. See also extended note to *Kirkwood v. Miller*, 73 Am. Dec. 137-149, for a general discussion of the law applicable to joint trespassers, their rights and liabilities.

ANHEUSER-BUSCH BREWING ASS'N v. MASON.

[44 MINNESOTA, 318.]

PRICE OF GOODS SOLD FOR UNLAWFUL USE MAY BE RECOVERED WHEN. —

One who sells goods to a person known to him to be the keeper of a house of prostitution without knowing just what was to be done with the goods, but supposing that she would sell or use them in her brothel, may, no other facts appearing, recover the price thereof in an action against her.

ACTION to recover the price of goods sold and delivered.
The opinion states the case.

John L. Townley, for the appellant.

Johns, Michael, and Johns, for the respondent.

COLLINS, J. This action was brought to recover a balance claimed to be due plaintiff (a corporation) for and on account of bottled beer sold to the defendant. The answer alleged that at the time of the sale defendant, as plaintiff well knew, was the keeper of a house of prostitution; that plaintiff sold the beer expressly for use and dispensation in and for carrying on and maintaining said house; and that when sold and delivered it was agreed between plaintiff and defendant that the beer was to be paid for out of the profits accruing to the latter from her unlawful occupation. On the trial, defendant

made no attempt to establish the defense as pleaded, but relied wholly upon admissions made by plaintiff's agent, when testifying, that he did not know just what was done with the beer, but that, when selling it to defendant, he supposed she would sell or use it in her brothel. On this admission, as we understand the record, the case was dismissed by the trial court.

While it would seem quite unnecessary so to do, it may be well to call attention at the outset to the fact that this case should not be confounded with one wherein the vendor in selling his goods has violated a statute requiring him to first procure a license, as was that of *Solomon v. Dreschler*, 4 Minn. 197 (278). Nor is it one in which the vendor has sold a proper article of merchandise in a legitimate way, but with the knowledge that it is to be disposed of by the vendee in direct violation of the law; for illustration, a sale of spirituous liquors by a qualified wholesale dealer, with full knowledge that the purchaser intended to retail the same in defiance of a prohibitory law, or without first obtaining the required license to sell; or a sale of poison by a druggist, knowing that it was intended for use in committing murder. The illegality of the transaction now under discussion occurs, if at all, in a matter collateral to the sale, incidentally implicated with it, and out of considerations of public policy solely. It has been well said that the consideration essential to a valid contract must not only be valuable, but it must be lawful, not repugnant to law or sound policy or good morals. *Ex turpi contractu actio non oritur*. The reports, both English and American, are replete with cases in which contracts of all descriptions have been held invalid on account of an illegality of consideration, illustrations of the acknowledged rule that contracts are unlawful and non-enforceable when founded on a consideration *contra bonos mores*, or against the principles of sound policy, or founded in fraud, or in contravention of positive provisions of a statute. The utmost difficulty has been experienced by the courts in applying the general rule, however, and an examination of the authorities wherein an application has been necessary will convince the reader that the conclusions reached and announced in the English tribunals are beyond reasonable reconciliation. This want of harmony, and that more uniform and consistent results have obtained in this country, is thoroughly demonstrated in two cases with us: *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132, — first opinion by

Judge Selden, and the second, on motion for rehearing, by Judge Comstock, — and *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205, in each of which the principal cases in both countries are ably and carefully reviewed, and the law applicable to the question involved in this action stated in accordance with the great weight of authority in the United States as well as in England. These cases, now regarded as leading on this side of the Atlantic, announce the rule to be that mere knowledge by a vendor of the unlawful intent of a vendee will not bar a recovery upon a contract of sale; yet if, in any way, the former aids the latter in his unlawful design to violate a law, such participation will prevent him from maintaining an action to recover. The participation must be active to some extent. The vendor must do something in furtherance of the purchaser's design to transgress, but positive acts in aid of the unlawful purpose are sufficient, though slight. While it is certain that a contract is void when it is illegal or immoral, it is equally as certain that it is not void simply because there is something immoral or illegal in its surroundings or connections. It cannot be declared void merely because it tends to promote illegal or immoral purposes. The American text-writers generally admit this to be the prevailing rule of law in the states upon this point: 1 Wharton on Contracts, sec. 343; Hilliard on Sales, 490, 492; 1 Parsons on Contracts, 456; Story on Contracts, 5th ed., sec. 671; Story's Conflict of Laws, sec. 253; Greenhood on Public Policy, 589. However, it has been suggested that this statement is subject to the modification that the unlawful use of which the vendor is advised must not be a felony or crime involving great moral turpitude: See *Hanauer v. Doane*, 12 Wall. 342; *Tatum v. Kelley*, 25 Ark. 209; 94 Am. Dec. 717; *Milner v. Patton*, 49 Ala. 423; *Lewis v. Latham*, 74 N. C. 283; *Bickel v. Sheets*, 24 Ind. 1; *Steele v. Curle*, 4 Dana, 381.

Without expressly indorsing the result in some of the cases, or all that has been said by the courts in their opinions when making an application to the facts then in hand of the rule so exhaustively examined and approved in *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132, and *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205, we cite, in support of the propositions therein contended for, and upon which we rest a reversal of the order of dismissal made by the court below, *Armstrong v. Toler*, 11 Wheat. 258; *Green v. Collins*, 3 Cliff. 494; *Dater v. Earl*, 3 Gray, 482; *Armfield v. Tate*, 7 Ired. 258; *Read v. Taft*,

3 R. I. 175; *Cheney v. Duke*, 10 Gill & J. 11; *Kreiss v. Seligman*, 8 Barb. 439; *Michael v. Bacon*, 49 Mo. 474; 8 Am. Rep. 138; *Brunswick v. Valleau*, 50 Iowa, 120; 32 Am. Rep. 119; *Webber v. Donnelly*, 33 Mich. 469; *Bishop v. Honey*, 34 Tex. 245; *Wright v. Hughes*, 119 Ind. 324; 12 Am. St. Rep. 412; *Feineman v. Sachs*, 33 Kan. 621; 52 Am. Rep. 547; *Rose v. Mitchell*, 6 Col. 102; 45 Am. Rep. 520; *Bancher v. Mansel*, 47 Me. 58; *Henderson v. Waggoner*, 2 Lea, 133; 31 Am. Rep. 591; *Gaylord v. Soragen*, 32 Vt. 110; 76 Am. Dec. 154; *Mahood v. Tealza*, 26 La. Ann. 108; 21 Am. Rep. 546; *Delavina v. Hill*, N. H., March 14, 1890.

The agent who made the sales, upon whose testimony the defendant saw fit to rest her case, knew that she was engaged in the unlawful business of keeping a house of ill-fame, and admits, also, that he supposed the beer would be used or sold in her place of business. Nothing further was shown which connected the plaintiff or its agent with any violation of the law. The burden was upon the defendant to show that an enforcement of the contract would be in violation of the settled policy of the state, or injurious to the morals of its people, and no court should declare a contract illegal on doubtful or uncertain grounds. And it may be difficult to distinguish between the cases in which the vendor, with knowledge of the vendee's unlawful purpose, does not become a confederate, and those wherein he aids and assists to an extent sufficient to vitiate the sale; but this difficulty is not apparent in the case at bar.

Order reversed.

SALES FOR AN UNLAWFUL USE — RECOVERY OF PRICE. — The general rule seems to be, that knowledge on the part of the vendor that the goods sold may be used for an unlawful purpose will not prevent his recovery of the purchase price from the vendee: *Brunswick v. Valleau*, 50 Iowa, 120; 32 Am. Rep. 119, and particularly extended note 122-127; *Wallace v. Lark*, 12 S. C. 576; 32 Am. Rep. 516; *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132, and note.

ROSENFELD v. ARROL.

[44 MINNESOTA, 395.]

WATER-FIXTURES, TENANT OF UPPER FLOOR RESPONSIBLE TO TENANT BELOW FOR PROPER USE AND CARE OF. — The lessee of an upper floor of a building is responsible for the proper use and proper care of the water and water-fixtures thereon, and is liable for damages sustained by the tenant of a lower floor by reason of his failure to exercise proper care in the use of such fixtures.

NEGLIGENCE, EVIDENCE OF, WHAT SUFFICIENT. — Evidence of defendant's negligence need not be direct and positive. The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence sufficient to rebut the presumption.

ACTION to recover damages. The opinion states the case.

Brown and Schrader, for the appellant.

Charles Bechhoefer, for the respondents.

COLLINS, J. It is not argued on this appeal that the court below erred in any of its rulings upon such questions of law as were presented during the trial, nor is it claimed that the order for judgment was incorrect, if the findings of fact were justified by the testimony. Appellant's contention is, that they were not; that the witnesses wholly failed to show his negligence; and further, that, from the undisputed testimony, it affirmatively appeared that the respondents had themselves contributed to the injury. Very little need be said upon either of these positions. Plaintiffs and defendant held leases for different floors of the same building. The plaintiffs occupied, as merchants, the ground-floor and basement, while defendant used the third floor for storing furniture, he having previously resided there. Usually this floor could be reached by either of two doors; but at the time of the flooding, one of these doors had been securely nailed up by defendant. The key to the other door, which was supposed to be and undoubtedly was locked, was in defendant's custody. He had exclusive control and possession of the third floor, and of the room thereon in which a faucet was turned by some one, from which the water ran upon the floor, and thence down upon plaintiffs' goods. Within the few days immediately preceding this accident, the furniture above mentioned had been sold at public auction, upon the premises, and with defendant's permission. He had also, after the auction, loaned his key to the purchaser of the furniture, and a man in the

employ of the latter had visited the place for the purpose of taking an inventory. It would seem quite obvious that this man, or the defendant, or some one of the persons attending the auction sale, — and there were several, — must have inadvertently turned the faucet and so left it. The defendant was responsible for the proper use and proper care of the water and water-fixtures. Liability attached to him on proof that negligence had occurred and damages had ensued: *Moore v. Goedel*, 34 N. Y. 527; *Simonton v. Loring*, 68 Me. 164; 28 Am. Rep. 29.

Negligence, which is the want or absence of ordinary care, is the gist of the action, and the burden was upon the plaintiffs to prove facts from which it could fairly be inferred that the defendant's negligence was the proximate cause of the injury. The evidence need not be direct and positive. The fact of negligence in any given case is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact. The plaintiffs were not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to themselves. Having done this, they were entitled to recover, unless the defendant produced evidence sufficient to rebut this presumption: 1 *Shearman and Redfield on Negligence*, secs. 57, 58, and cases cited. The trial court held that the presumption of negligence on defendant's part, raised by plaintiffs' testimony, had not been rebutted, and with its finding upon this fact we cannot interfere. There was an abundance of testimony in support of it.

There is nothing in defendant's claim that plaintiffs were guilty of contributory negligence. At most, the testimony on this point was, that one of the plaintiffs informed defendant, the latter assenting, that when there was danger of the pipes freezing on the upper floors, he would shut the water off in the basement. The time when freezing might reasonably be expected had not arrived, nor was the alleged injury caused by the freezing up of the pipes.

Order affirmed.

LANDLORD AND TENANT—LIABILITY OF LESSEE OF UPPER FLOOR OF A BUILDING. — The servants of the occupant of an upper tenement having carelessly left open a faucet, thereby causing the water to overflow and flood the tenement below, the occupant of the upper tenement is liable for the damages thereby occasioned; *Simonton v. Loring*, 68 Me. 164; 28 Am. Rep. 29, and note 32-34. Compare *Glickauf v. Maurer*, 75 Ill. 289; 20 Am. Rep.

238, and note. It is the lessee's duty to keep water-pipes, gutters, etc., in repair: *Shindelbeck v. Moon*, 32 Ohio St. 264; 30 Am. Rep. 584.

NEGLIGENCE, WHAT EVIDENCE REQUIRED TO ESTABLISH. — A plaintiff need only establish a *prima facie* case of negligence: *Achtenhagen v. City of Watertown*, 18 Wis. 331; 86 Am. Dec. 769; *Marlatt v. Levee etc. Co.*, 10 La. 583; 29 Am. Dec. 468. And then the burden is cast upon defendant to show that he was not guilty of negligence for which he is chargeable: *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175.

BOARD OF EDUCATION OF THE VILLAGE OF PINE ISLAND v. JEWELL.

[44 MINNESOTA, 427.]

MONEY OF SCHOOL DISTRICT LOST BY BURGLARY, LIABILITY OF TREASURER.

FOR. — The fact that the treasurer of a school district has lost the funds of the district by burglary without his fault does not constitute a defense to an action on his official bond for failure to pay over to his successor in office money received, but never paid out, by him, where neither the statute nor the bond contemplates any other mode by which he is to be relieved from accountability than by payment of the money received by him.

RELEASE BY SCHOOL DISTRICT OF TREASURER FOR MONEY STOLEN FROM HIM INEFFECTUAL. — A vote of the electors of a school district, and of its board of education, without consideration, to discharge the treasurer of the district from liability for money stolen from him without his fault, is legally ineffectual to discharge him from his obligation.

ACTION on an official bond. The opinion states the case.

F. M. Wilson and W. C. Williston, for the appellants.

J. C. McClure, for the respondent.

DICKINSON, J. This action is prosecuted by an independent school district, organized under chapter 36 of the General Statutes of 1878, to recover on the official bond of a treasurer of the district for moneys which he received, but never paid out nor delivered to his successor in office. The principal ground of defense is, that while the treasurer had the money of the district locked in an iron safe in his place of business, which is to be taken to have been a proper place for keeping such funds, the building was burglariously entered in the night, the safe blown open with gunpowder, and the funds stolen. We are required to pass upon the sufficiency of this defense. The statute (Gen. Stats. 1878, c. 36, sec. 10¹) requires the treasurer to execute a bond, with sureties, "conditioned for the faithful discharge of his duties as treasurer." It

also declares that the treasurer shall receive, and upon the order of the board pay out, all moneys belonging to the district. He is required to make official statements of the moneys received by him, and of all his disbursements, and to "pay to his successor in office, upon demand, . . . all money in his hands belonging to said district." The bond upon which this action is prosecuted adds to the condition specified in the statute (the faithful discharge of the duties of the office) the further condition, among others, that he "shall, at the expiration of his term of office, pay over to his successor in office all moneys remaining in his hands as treasurer as aforesaid."

There is some conflict in the decisions as to the responsibility of public officers and their sureties for the loss of public moneys without negligence or fault on the part of the officers. While in some cases the rule of responsibility of bailees for hire has been applied, exonerating officers who have been found guiltless of negligence, this measure of responsibility is not generally accepted. The great weight of authority in this country will sustain the general propositions, with respect to the liability of such officers and their sureties for the loss of public moneys, that where the statute, in direct terms or from its general tenor, imposes the duty to pay over public moneys received and held as such, and no condition limiting that obligation is discoverable in the statute, the obligation thus imposed upon and assumed by the officer will be deemed to be absolute, and the plea that the money has been stolen or lost without his fault does not constitute a defense to an action for its recovery; that the rule of responsibility of bailees for hire is not applicable in such cases; that where the condition of a bond is, that the officer will faithfully discharge the duties of the office, and where the statute, as before stated, imposes the duty of payment or accountability for the money, without condition, the obligors in the bonds are subject to the same high degree of responsibility; and that the reasons upon which these propositions rest are to be found both in the unqualified terms of the contract and in considerations of public policy: *United States v. Prescott*, 3 How. 578; *United States v. Dashiell*, 4 Wall. 182; *Boyden v. United States*, 13 Wall. 17; *Inhabitants of Hancock v. Hazzard*, 12 Cush. 112; 59 Am. Dec. 171; *Inhabitants of New Providence v. McEachron*, 33 N. J. L. 339; affirmed 35 N. J. L. 528; *Commonwealth v. Comly*, 3 Pa. St. 372; *State v. Harper*, 6 Ohio St. 607; 67 Am. Dec. 363; *District Township of Taylor v. Morton*, 37 Iowa, 550;

Thompson v. Board, 30 Ill. 99; *Halbert v. State*, 22 Ind. 125; *Morbeck v. State*, 28 Ind. 86; *Ward v. School District*, 10 Neb. 293; 35 Am. Rep. 477; *Wilson v. Wichita Co.*, 67 Tex. 647; *State v. Nevin*, 19 Nev. 162; 3 Am. St. Rep. 873; *State v. Moore*, 74 Mo. 413; 41 Am. Rep. 322; *State v. Powell*, 67 Mo. 395; 29 Am. Rep. 512; *Commissioners v. Lineberger*, 3 Mont. 231. The tenor of our own decisions has been in harmony with these authorities, and they may be said to have been based largely at least upon the same reasons above stated: *County of Hennepin v. Jones*, 18 Minn. 182 (199); *County of McLeod v. Gilbert*, 19 Minn. 176 (214); *County of Redwood v. Tower*, 28 Minn. 45. This being, as we deem, the generally established rule of law, and this strict measure of responsibility having been so long ago declared by this court upon grounds which, as we think, support the propositions above stated, it should be left for the legislature to modify the law, if the prevailing doctrine is deemed to be inexpedient. From the fact, however, that, notwithstanding the decisions of this court, above cited, no legislation upon the subject has followed, it may be inferred that, in the judgment of the legislature, no change in the law has been deemed to be expedient.

Applying to this case the propositions above stated, the officer and his sureties were responsible. Not only familiar considerations of public policy support this conclusion, but by the terms of the statute and of the bond the obligation of the treasurer to pay over the public moneys received by him is subject to no qualification which would permit the defense here relied upon to be interposed. Neither the statute nor the bond seems to contemplate any other mode by which the officer is to be relieved from accountability than by payment of the money received by him. Whether it would be a defense if by act of God or of the public enemy he were prevented from paying the money, we do not decide. Such was the case of *United States v. Thomas*, 15 Wall. 337, relied upon by the appellants. That decision was not intended to overrule the prior decisions of that court above cited, holding that a loss of the money by theft is no defense. The decision was based upon considerations which were regarded as distinguishing the case from those previously before the court.

The further defense was made that, at a special meeting of the qualified voters of the district, and at a meeting of the board of education of the village, resolutions were adopted to the effect that the district should assume the loss, and that the

treasurer be discharged from liability. We are of the opinion that neither the action of the board nor that of the district was legally effectual to gratuitously discharge the obligation of the treasurer. The express provision in the statute that, in case of any breach in the conditions of the treasurer's bond, "the board shall cause an action to be commenced thereon," etc. (Gen. Stats. 1878, c. 36, sec. 107), in connection with the fact that the statute contains no express authority to discharge such an obligation, nor, so far as we can discover, anything from which such authority is to be implied, is enough to justify the conclusion that no such power has been conferred. We have used the term "gratuitously" for the reason that no consideration for the surrender or discharge of the obligation is apparent. See, upon this subject, *Ward v. School District*, 10 Neb. 293; 35 Am. Rep. 477; *District Township of Taylor v. Morton*, 37 Iowa, 550; *Commissioners v. Lineberger*, 3 Mont. 231.

Order affirmed.

OFFICIAL BOND — PUBLIC TREASURER. — A public treasurer is liable on his official bond for money stolen from him without his fault: *Note to State v. Nevin*, 3 Am. St. Rep. 880, 881.

CARSTEN v. NORTHERN PACIFIC R. R. Co.

[44 MINNESOTA, 454.]

ROUND-TRIP RAILWAY TICKET, UNUSED PART OF, TRANSFERABLE. — A round-trip railway ticket used by the buyer thereof in traveling to the place named therein, and then sold and transferred to another person, in the absence of any restrictions in the original contract of sale, is valid in the hands of the holder, and entitles him to a return passage.

DAMAGES FOR UNLAWFUL ATTEMPT TO EJECT PASSENGER FROM RAILWAY TRAIN. — If the conductor of a railway train refuses to recognize a valid ticket, and demands from the holder the regular fare, and attempts to eject him by force for non-payment, the company will be liable in damages for the assault, and in assessing the damages the jury may consider, in connection with the assault, the annoyance, vexation, and indignity suffered by the passenger.

DAMAGES TOO REMOTE WHEN. — In an action to recover damages for unlawfully ejecting a passenger from a railway train, damages resulting from his loss of a job of work, by reason of his delay at the station at which he was compelled to leave the train, are too remote to be considered.

ACTION to recover damages for a tort. The opinion states the case.

John C. Bullitt, Jr., and Tilden R. Selmes, for the appellant.

J. B. Douglas and J. N. True, for the respondent.

VANDEBURGH, J. The defendant, in August, 1888, issued excursion passenger-tickets from Detroit, in this state, "to Minneapolis and return," to be used within a time limited, but without restrictions as to transfer. The plaintiff purchased one of these tickets at second hand of a railway ticket-broker, and in conformity with the usage of the company, had it stamped by the defendant's agent at the depot in Minneapolis, and thereupon presented it to the baggage-man, who punched it and checked his baggage, and within the time limited plaintiff took passage on a regular passenger train from Minneapolis to Detroit. While on the way, and before reaching Brainerd, an intermediate station, his ticket was examined by an agent of the company, who is styled a "ticket-exchanger," and acted as an assistant to the regular conductor, and who notified the plaintiff that his ticket was not good, on the ground stated by him that it was bought at a "scalper's office." He, however, took up and retained the ticket, and refused to return it to the plaintiff. The regular conductor soon after came along and demanded plaintiff's fare, and when informed of what had been done by the exchanger, also stated that the ticket was not good, and notified him that he would have to leave the train unless he paid his fare, and soon after came back, accompanied by two brakemen, as the train was approaching a station, for the purpose, as the evidence tends to show, of ejecting plaintiff from the train. They took him by the shoulder and led him to the door in presence of the passengers, when a stranger paid his fare to Brainerd, at which place the plaintiff voluntarily left the train. Plaintiff acted under compulsion when leaving his seat when ordered, but made no resistance, and there was in fact no violence or vindictive or abusive language used.

1. The evidence is sufficient to show that the ticket was genuine and was good for one passage from Minneapolis to Detroit as a return ticket, and that it was wrongfully taken away from plaintiff, and appropriated by the agent of the defendant. The ticket was transferable in the absence of any restrictions in the original contract of sale, and was valid in plaintiff's hands. The conductor was fully advised of the facts in the case, which he could verify by reference to his assistant on the same train. His conduct in requiring the plain-

tiff to leave the train was therefore wrongful: *Burnham v. Grand Trunk R'y Co.*, 63 Me. 298; 18 Am. Rep. 220.

2. It is an action sounding in tort, and we think the plaintiff entitled to claim damages for the wrong and injury done him, in addition to the price of the ticket, though no particular loss or special injury to his person was shown. The evidence tended to prove that the agents of the defendant laid hands on him, and were proceeding to eject him by force, if necessary, from the car, which was full of passengers. The fact that he escaped personal violence by non-resistance does not deprive him of his right of action; and the jury were entitled to consider, in connection with the physical acts of the conductor in wrongfully attempting to eject him, the annoyance, vexation, and mortification suffered by him, and the indignity put upon him: *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133; 3 Sutherland on Damages, 712, 715; 2 Beach on Railway Law, sec. 891. But the jury must be governed by the evidence, and the damages assessed must be appropriate to the nature of the case, which will be modified by the circumstances, such as the presence or absence of personal malice, actual violence, and threatening or insulting language: *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 560; 68 Am. Dec. 562, 573. The instruction given by the court to the jury, that if the conductor took up the ticket, and failed to give any excuse for his refusal to return the same to plaintiff, and no excuse existed, they might presume that he acted malevolently, and with a tyrannical and oppressive motive, and might award him "any amount of damages that is proper, not exceeding the sum of one thousand dollars," was, we think, in view of the evidence in the case, erroneous, and likely to mislead the jury as to the extent of their discretion on the question of damages.

3. The plaintiff was permitted, against the objection of the defendant, to prove that, by reason of his delay at Brainerd, he lost a job of thrashing at Detroit, for which he expected \$2.25 per day. He testified that he was detained there for a week for want of money to go any farther, and this alleged loss the jury were allowed to consider. This was error. Such damages are too remote. They cannot be considered the proximate result of the alleged wrongful act of the conductor. There must have been several other independent causes to which the same result might have been referred: *Brown v. Cummings*, 7 Allen, 507.

Order reversed.

RAILROAD COMPANIES — DAMAGES FOR WRONGFUL EJECTION OF A PASSENGER FROM CAR. — A carrier is answerable for exemplary damages for wrongfully ejecting a passenger from its cars: *Hend v. Georgia P. R'y Co.*, 79 Ga. 358; 11 Am. St. Rep. 434, and note; *Cincinnati etc. R'y Co. v. Cole*, 29 Ohio St. 126; 23 Am. Rep. 729; *Palmer v. Railroad*, 3 S. C. 580; 16 Am. Rep. 750. And the jury, in estimating the amount of damages, may take into consideration not only the annoyance, vexation, delay, and risk to which the passenger was subjected, but also any indignity he may have suffered through the expulsion: *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133; *Georgia etc. R. R. Co. v. Olds*, 77 Ga. 673.

DEVLIN AND WIFE v. QUIGG.

[44 MINNESOTA, 534.]

MORTGAGE TO DEFAUD CREDITORS — ACTION TO FORECLOSE MAY BE ENJOINED. — A mortgagor may maintain an action to enjoin the foreclosure of a mortgage executed without consideration, notwithstanding it was given by him for the purpose of hindering and delaying his creditors.

APPELLATE COURT WILL NOT DISTURB FINDINGS of the trial court, where there is evidence sufficient to justify them.

ACTION to foreclose a mortgage under a power. The defendant, Quigg, who was the assignee of the mortgage, appealed. The other facts are stated in the opinion.

George B. Edgerton and George W. Wilson, for the appellant.

J. G. Redding and Lorin Cray, for the respondents.

MITCHELL, J. This was an action to enjoin the foreclosure of a mortgage under a power, on the ground that it was without consideration, and was not executed to secure the payment of any indebtedness. The court found as facts that "the mortgage was not executed to evidence, provide for, or secure the payment of any indebtedness to the mortgagee or any other person on part of the plaintiffs, or either of them, or any one else; that it was executed without consideration, and for the sole purpose of creating an apparent indebtedness and cloud upon the premises to hinder and delay creditors." To rebut the solemn admissions of the plaintiffs contained in the mortgage, the evidence should be strong and convincing, especially as the mortgagee was dead. It is not as clear and satisfactory as might be desired, and, so far as we can judge from a cold record, we might have hesitated to arrive at the same conclusion which the learned trial judge reached. But

if he believed the testimony of the plaintiffs and their witnesses, — and their credibility was for him to determine, — it was sufficient to justify the findings, and we cannot disturb them. Defendant, however, invokes the familiar maxims, “that he who comes into equity must do so with clean hands,” and that “a party cannot be heard to set up his own fraud as a ground for relief.” But these maxims are not applicable here. A conveyance or transfer in fraud of creditors is not regarded as *turpis causa*, which renders all contracts void. It is merely voidable only in favor of the defrauded creditors, leaving it in all other respects, and as between the parties, valid; the fraud, if there be one, being strictly a private fraud, which is available only to those injured by it: *Livingston v. Ives*, 35 Minn. 55.

Hence, if this mortgage had been given to secure an actual indebtedness, the fact that it was also given and taken for the purpose of defrauding the creditors of the mortgagor would constitute no defense to an action to foreclose, or any ground for enjoining a foreclosure under a power. The plaintiffs, doubtless, could not set up their own fraud as a substantive cause of action to recover back property actually conveyed for the purpose of defrauding their creditors. But here the defendant is the actor. He is proceeding to enforce the mortgage, which the plaintiffs are seeking to prevent, not on the ground that it was executed to defraud creditors, but that it was without consideration, and does not in fact secure any indebtedness. If the defendant had proceeded to foreclose by action, there can be no doubt that this would have been available as a defense, and could not have been rebutted or overcome by showing that the mortgage was executed to defraud creditors: *Wearse v. Peirce*, 24 Pick. 141; *Hannan v. Hannan*, 123 Mass. 441; 25 Am. Rep. 121; *Briggs v. Langford*, 107 N. Y. 680; *Sackner v. Sackner*, 39 Mich. 39. But it can make no difference that the defendant is proceeding under the power of sale, and therefore the plaintiffs put to a suit to enjoin. The maxim, *In pari delicto*, etc., is not applicable. The plaintiffs are not seeking to recover back property which they have already conveyed, but to prevent defendant from enforcing the mortgage; and this they do, not on the ground that it was executed to defraud creditors, but that it was executed without consideration, and that “there was no debt to secure.” This is a good defense to the mortgage, independently of the fraudulent purpose for which it may have been executed, and one

that may be shown, notwithstanding that the mortgage is under seal.

Judgment affirmed. —

MORTGAGE — WANT OF CONSIDERATION. — As between the parties in an action to foreclose a mortgage, want of consideration is a good defense, and may be shown by parol: *Hannan v. Hannan*, 123 Mass. 441; 25 Am. Rep. 121.

INJUNCTION MAY LIE TO RESTRAIN THE FORECLOSURE OF MORTGAGES, when the foreclosure is improperly sought: *Gardner v. Terry*, 99 Mo. 523.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

PRICE v. SPRINGFIELD REAL ESTATE ASSOCIATION.

[101 MISSOURI, 107.]

JUDGMENT OF PROBATE COURT, PRESUMPTION IN FAVOR OF. — The orders and judgments of the probate courts of Missouri are entitled to the same favorable presumptions as to jurisdiction as are those of the circuit courts, or other courts of general jurisdiction. The judgments and orders of the former are not open to collateral attack.

EXECUTORS AND ADMINISTRATORS, SALES BY, PRESUMPTIONS IN FAVOR OF. — One who claims under an administrator's deed need only produce the deed, order of sale, and order of court approving the sale, to raise the presumption that the requisite antecedent steps for the sale were taken; and where the administrator may purchase at his own sale by paying not less than three fourths of the appraised value of the property, it will also be presumed, in the absence of evidence to the contrary, in favor of a purchaser from him, that he complied with the law.

EXECUTORS' AND ADMINISTRATORS' SALES — APPROVAL AT SUBSEQUENT TERM. — When an administrator's sale is not required to be approved at the term of court when made, its approval at a subsequent term is not irregular.

DISQUALIFIED JUDGE — PRESUMPTION IN FAVOR. — It will be presumed that a judge complied with the statute requiring him not to sit in the determination of any cause or proceeding in which he is interested. This presumption prevails, although it is shown that he was present at the opening of court each day.

EXECUTORS' AND ADMINISTRATORS' SALES — EFFECT OF RECITAL IN DEED. — Where the statute does not require an administrator's deed to recite the time and place of sale, nor that it was made during the session of a certain court, the order of court approving the sale is better evidence that it was made at the proper time and place than a recital to the contrary in the deed. Such recital may therefore be disregarded as a clerical mistake.

EXECUTORS' AND ADMINISTRATORS' SALES, PRESUMPTION IN FAVOR OF. — If an administrator's sale was made nearly forty-three years before suit

was brought in ejectment, and the claimant under such sale has paid taxes on the land and exercised acts of ownership over it for twenty years before suit, it will be presumed that the administrator did his duty according to law, and such presumption is not overcome by unnecessary recitals in his deed.

Boyd and Delaney, for the appellant.

B. N. Massey, C. W. Thrasher, and Adiel Sherwood, for the respondent.

BLACK, J. This is an action of ejectment for thirty acres of land near Springfield, in Greene County. Plaintiff appealed from a judgment in favor of the defendant.

It is admitted that Daniel B. Miller died seised of the land in 1839 or 1840. In 1869 and 1870, the heirs of Miller made deeds of quitclaims to John C. Price, and the plaintiff claims under the last will of Price.

The defendant, for a record title, put in evidence a deed from Joshua Davis, clerk of the county court of Greene County, to Joseph Weaver, dated the 4th of May, 1843, from which it appears Weaver, as administrator of the Miller estate, sold eighty acres of land, of which the land in suit is a part, and he became the purchaser at his own sale; a sheriff's deed, dated the 14th of September, 1855, made by virtue of proceedings duly had in the partition of the real estate of Joseph Weaver, conveying to Joseph Farrier the thirty acres in question; also other deeds, showing a chain of title from Farrier to the defendant. This suit was commenced on the 13th of April, 1886, and a further defense is the statute of limitations.

There is no evidence showing, or tending to show, that plaintiff, her testator, or the Miller heirs ever had actual possession of the thirty acres, or any part of it. On the other hand, it is shown that Farrier began cutting fire-wood from the land in 1864. Like acts of ownership have been continued by him, and those claiming from and under him, down to the commencement of this suit, though it does not appear that the land has ever been cleared or cultivated. Defendant and those under whom it claims have paid all of the taxes assessed against the property from 1841 to 1883. It is unnecessary to set out with more detail the evidence on the issue of adverse possession; for the instructions given are so inconsistent that it is impossible to tell on what theory the court decided the case, it having been tried by the court

without a jury. If the administrator's deed is a valid conveyance, and must be so declared as a matter of law on this record, then the judgment must be affirmed, without any regard to the instructions.

The deed from the county clerk to Weaver is, as has been said, dated the 4th of May, 1843. It recites a public sale made by Weaver, as administrator of the estate of Daniel B. Miller, on the 11th of September, 1841, pursuant to an order of the county court made on the 6th of August, 1841, and that Weaver, being the highest bidder, became the purchaser of the eighty acres at the price of \$280. The defendant also put in evidence three orders of the county court, to the following effect: One made on August 6, 1841, directing the administrator to sell the eighty acres of land to the highest bidder, at the court-house door, on a credit of nine months, to pay the debts of the Miller estate; one dated the 3d of November, 1841, showing that Weaver, as administrator, exhibited the sale bill for the eighty acres of land sold according to the previous order of the court, and directing that he be charged with the sum of \$280, the amount for which the land was sold; and one dated the 31st of May, 1843, approving the sale, and directing the clerk to execute a deed to Weaver.

There is no affirmative proof that these are all of the orders made by the court in the matter of this sale; and it was admitted on the trial that all of the papers filed in the matter of the Miller estate had been lost or destroyed.

1. The plaintiff insists that, in order to sustain the administrator's sale, it devolved upon the defendant to show that the administrator filed a petition for the sale of the real estate, to produce an order of the court directing notice to be given to all parties in interest of the filing of such a petition, and to show that the administrator caused the property to be appraised. These objections are all based upon the proposition that the county courts are courts of special and limited jurisdiction, and that all these matters must be shown in support of the administrator's deed. Early cases are cited giving some support to the proposition, but the doctrine has long since been exploded. Formerly county courts had, and probate courts now have, exclusive original jurisdiction in matters concerning the administration of estates of deceased persons. It is now well-settled law that the orders and judgments of these courts are entitled to the same favorable presumptions and intendments that are accorded to the judgments

of circuit courts. The proceedings of our probate and county courts are no more open to collateral attack than are the proceedings of any other courts: *Camden v. Plain*, 91 Mo. 117; *Rowden v. Brown*, 91 Mo. 429, and cases cited. Here the defendant put in evidence the deed, order of sale, and the order approving the same. It was not necessary for the defendant, in the first instance, to make any other or further proof. From the deed and those orders it will be presumed that all requisite antecedent steps had been duly and timely taken, until the contrary is made to appear. These observations dispose of all of the objections before named.

2. It is true, the administrator became the purchaser at his own sale. He had a right, under the law as it then stood, to purchase at his own sale, whether private or public, by paying not less than three fourths of the appraised value of the property. For the reasons before stated, it will be presumed that his bid was at least three fourths of the appraised value.

3. The sale was reported to the county court at the November term, 1841, which must have been the next term after the sale, so that in this respect there was a full compliance with the law; but the objection is made that the sale was not approved until the May term, 1843. A complete answer is, that the law did not require the sale to be approved at the term when the report was made. The report having been made at the proper time, it stood as a pending matter until approved or disapproved. The approval at a subsequent date was not even irregular or erroneous, much less void. Besides all this, a premature report and approval does not make the sale void, and the report may be filed and sale approved at a term later than the next one after the sale: *Sims v. Gray*, 66 Mo. 614; *Wilkerson v. Allen*, 67 Mo. 502; *Henry v. McKerlie*, 78 Mo. 429; *McVey v. McVey*, 51 Mo. 407.

4. An objection is based upon the fact that Weaver, the administrator, was one of the justices of the county court when the order of sale and of approval was made. The statute declares that no justice of the county court shall sit in the determination of any cause or proceeding in which he is interested; and if the majority of the justices shall be interested in any case or proceeding pending before them, the same shall be certified to the circuit court: R. S. 1835, 3d ed., secs. 39, 41, p. 159. Two of the three justices had no interest whatever in this matter. It is not shown that Weaver took any part, as a member of the court, in these particular proceed-

ings, and there is no presumption that he did participate in the disposal of them because he was present at the opening of court on each day. It must be presumed that he obeyed the law and dictates of common honesty. The objection has no merit in it.

5. The statute in force in 1841 provides that all public administrator's sales shall be made at the court-house door on some day while the circuit or county court is in session. The deed recites a public sale made on the 11th of September, 1841, but it does not state where the sale was made, nor that either court was in session. The proof shows that these courts were not in session on the 11th of September, 1841, but it appears a special term of the county court was held on September 18th of that year. *Mobley v. Nave*, 67 Mo. 546, holds that an administrator's deed passed no title, because the sale was not made during the session of the probate, circuit, or county court; and a like ruling was made in *Ainge v. Corby*, 70 Mo. 258, but in that case all of the proceedings, including the report of the sale, were in evidence. We do not regard these cases as controlling this one.

The statute of 1835 made it the duty of the administrator to make a full report of his proceedings, showing the certificate of appraisement and a copy of the advertisement, and verified by affidavit. It is the duty of the court to approve or disapprove the report. If disapproved, the sale is of no validity. If approved, it is valid, and the administrator, or, where he is the purchaser, the clerk, is required to execute a deed "stating the date of the order of sale and the court by which it was made, and the consideration, and conveying to the purchaser," etc. "Such deed shall convey to the purchaser all the right, title, and interest which the deceased had," etc. The object of requiring these sales to be confirmed is, that the court will look through the report, appraisement, and advertisement, and see that the administrator has complied with the order of sale and the law. The approval is a judgment, and implies a finding that the proceedings of the administrator have been conducted according to the law and order of sale. This court, in *Tutt v. Boyer*, 51 Mo. 425, when speaking of alleged defects in the appraisement and advertisement, said: "The approval of the sale was a final judgment from which an appeal might have been taken, and cannot be impeached collaterally. This judgment has the effect of curing such defects."

It is to be further observed that the statute before quoted

only required the deed to recite, — 1. The order of sale; 2. The court by which it was made; 3. The consideration. It did not require the clerk to state the date of the sale, nor that the sale was made during the session of the county or circuit court. In these respects the statute is materially different from those of 1845 and subsequent revisions: R. S. 1845, sec. 34, p. 88. The clerk, therefore, in stating the date of the sale, made a recital which the law did not require him to make.

Now, we do not say that the order approving the sale precludes all inquiry as to whether the sale was made during the session of the county or circuit court; but we do say it is, in the absence of the report of sale, better evidence that the sale was made at the proper time and place than any contrary recital in the clerk's deed. The law not requiring him to state the time and place of the sale, that recital may be disregarded. This sale was made nearly forty-three years before the commencement of this suit. The plaintiff, and those through whom she claims, have never had the actual possession of the thirty acres in question. During that time the persons claiming under the administrator's deed have paid taxes on the land, and for a period of twenty years before the commencement of this suit have exercised open acts of ownership over it. Under these circumstances, it must be presumed that the administrator performed his duties, until the contrary is made to appear. The presumption is no slight one, either. The recital in the deed, being an unnecessary one, does not overcome the presumption, even if the law required a recital in the deed of the time and place of the sale; still, taking the recital in this deed in connection with the judgment of confirmation and the fact that the county court was in session on the 18th of September, which was after the order of sale and before the filing of the report thereof, it should be presumed that the recital of the time of the sale is a clerical mistake: *Jones v. Manly*, 58 Mo. 559. The administrator's deed is a valid conveyance, and the judgment should be and is affirmed.

PROBATE COURTS — JURISDICTION. — Ordinarily, courts of probate are courts of limited jurisdiction: *People's Sav. Bank v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 894, and note; but in some states they are courts of general jurisdiction: *Borden v. State*, 11 Ark. 519; 54 Am. Dec. 217; *Bush v. Lindsey*, 24 Ga. 245; 71 Am. Dec. 117; *Kimball v. Fisk*, 39 N. H. 110; 75 Am. Dec. 213; *Schultz v. Schultz*, 10 Gratt. 358; 60 Am. Dec. 335; and their judgments and decrees are conclusive upon every other court until reversed, and they cannot be collaterally impeached for errors or irregularities: *Tucker v. Harris*, 13 Ga. 1; 58 Am. Dec. 488; *Redmond v. Collins*, 4 Dev. 430; 27 Am.

Dec. 208; *McPherson v. Cunliff*, 11 Serg. & R. 422; 14 Am. Dec. 642; *Singerly v. Swain*, 33 Pa. St. 102; 75 Am. Dec. 581; *Toddeman v. Hildebrandt*, 72 Cal. 313; *Washington v. Black*, 83 Cal. 290; *Smith v. Biscailuz*, 83 Cal. 345; *Holden v. Lathrop*, 65 Mich. 652. In those states where probate courts have general jurisdiction, they are entitled to all the presumptions in favor of their proceedings which are allowed other tribunals of general jurisdiction: *Kimball v. Fisk*, 39 N. H. 110; 75 Am. Dec. 213. As to the conclusiveness of the proceedings of a probate court, see note to *McPherson v. Cunliff*, 14 Am. Dec. 663-665. See also *Goodwin v. Sims*, 86 Ala. 102; 11 Am. St. Rep. 21, and note.

MURRAY v. MISSOURI PACIFIC RAILWAY COMPANY.

[101 MISSOURI, 226.]

NEGLECTANCE. — BURDEN OF PROOF OF NEGLIGENCE as alleged in the petition is upon the plaintiff, and the burden of proving negligence as alleged in the answer is upon defendant, while the jury is to determine the question from all the evidence, no matter by whom offered.

NEGLECTANCE — DAMAGES — VALUE OF NURSE'S SERVICES. — In an action to recover damages for personal injuries suffered through negligence, plaintiff may recover a fair compensation for necessary expenses incurred for nursing during a fixed period, without evidence of the value of such services. The jury may measure the same by its own knowledge and experience, and will be presumed to be reasonably familiar with the value of such services.

NEGLECTANCE — ONE INJURED by a train of cars while crossing the street, on account of the failure of the railroad company to ring the bell, to give proper danger signals, or to keep a watchman at the street crossing, as required by ordinance, is entitled to recover, if exercising proper care himself, whether his injury was occasioned by two or more of such negligent acts or one only of them.

NEGLECTANCE, WHEN QUESTION OF FACT. — If one is injured by a train of cars while crossing the street, and alleges negligence on the part of the company in failing to ring the bell, and the evidence on this point is conflicting and equally divided, the question is one of fact to be determined by the jury.

NEGLECTANCE, EVIDENCE OF. — FAILURE TO HAVE FLAGMAN at a railroad crossing, as required by a city ordinance, is negligence *per se* on the part of the railroad company.

Bennett Pike and Henry G. Herbel, for the appellant.

A. R. Taylor, for the respondent.

BLACK, J. This is a personal damage suit. Plaintiff was a driver of a hose-carriage connected with the fire department of the city of St. Louis. He and others in charge of the hose were going north on Summit Street. The defendant's road crosses this street, there being four or five tracks at the crossing, which run in an east and west direction. As the plaintiff attempted to go over the crossing, a train of box and flat

cars backed in from the west, and struck his team and carriage. He was thrown from his seat and received severe and permanent injuries, one of them being a broken leg. The cause of action is based upon a violation of certain ordinances which make it the duty of defendant to have a watchman at crossings like the one in question, to display a signal flag; to constantly sound the engine bell when the train is moving; to have a man stationed on top of the car farthest from the engine, when the train is backing, to give danger signals; and to have the train well manned with experienced brakemen at their posts.

Undisputed evidence shows that the gates at the crossing were up at the time of the accident, that there was no flagman present, and that a caboose-car stood on one track so as to obstruct, to some extent, a view of the backing train. Other evidence for the plaintiff tends to show that he was driving his team at a walk or slow trot; that he exercised due care; that there was no man on the car farthest from the engine; and that the bell was not ringing. The defendant's evidence tends to show a full compliance with the ordinances in the last-mentioned respects. The accident occurred during a strike by the defendant's employees, and a number of strikers and policemen were at the crossing. There is evidence to the effect that four or five persons shouted to plaintiff to stop, when he was fifty feet from the tracks, but that he went on, seeming to think the train was not close enough to catch him. Plaintiff says no one hallooed to him until just as the train struck his carriage, and in this he is corroborated by two persons who were on the hose-carriage.

1. Of the instructions given at the request of the plaintiff, the first is, that the burden of proving negligence of defendant, as alleged in the petition, is upon the plaintiff, and the burden of proving negligence, as alleged in the answer, is upon the defendant. That this instruction asserts correct propositions of law in the abstract is conceded; but the objection to it is, that it deprived defendant of the benefit of evidence offered by the plaintiff, tending to show contributory negligence on his part. There was some evidence introduced by the plaintiff, having some tendency to show he might have seen the approaching cars, and that he attempted to cross the track when he should have stopped. There is nothing, however, in the instruction which deprives the defendant of the benefit of this evidence. It does not say that the defendant must show con-

tributory negligence by the evidence of witness, introduced by itself. The jury are left to determine the question from all the evidence, no matter by whom offered.

2. The instruction concerning damages allowed, among other things, a fair compensation "for any expenses necessarily incurred by plaintiff for medical attention and nursing." The objection is, that there is no evidence of any expenses incurred for nursing. The plaintiff was in bed for five months, and according to the evidence of the surgeon, was nursed by the ladies about the house, who were constant in their attendance,—relatives, he thinks. There is no other evidence upon the subject. This case is quite unlike that of *Duke v. Missouri Pac. R'y Co.*, 99 Mo. 347. There the jury was told that if plaintiff "expended large sums of money for professional services, physicians, and nurses, also for drugs and medicines," then she could recover therefor. She had been treated and cared for at a hospital, and there was not a word of evidence as to any of the alleged outlays. Here there is express proof as to the amount of the surgeon's bill. The only question is as to nursing. The time during which the plaintiff had and required nursing is sufficiently fixed, and the only want of evidence is as to the value. Jurors may well be presumed to be reasonably familiar with the value of such services, and they may measure the same by their own knowledge and experience. It has never been the practice to enter upon detailed proof upon this element of damages in suits of the character of the present one. The plaintiff is crippled for life, and the judgment for \$5,750 cannot be said to be excessive. Under these circumstances, the judgment ought not to be reversed on the objection now being considered.

3. By the third instruction the jurors were told that if defendant failed to have a watchman stationed at the crossing, and if plaintiff, while exercising care in driving across the same, was injured by a collision with a train of the defendant's cars, "and if the failure to keep said watchman directly contributed to cause plaintiff to be injured, then plaintiff is entitled to recover." If this instruction allowed a recovery in the event that defendant's negligence contributed with negligence of the plaintiff to produce the injury, then it would be radically wrong; but it asserts no such a proposition. By this very instruction, as well as one given at the request of the defendant, the jury must have found that plaintiff was exercising ordinary care, before there could be a finding for him.

Other grounds of recovery, namely, failure to ring the bell and to have a man on the car farthest from the engine to give danger signals, were presented by other instructions. If a failure to comply with the ordinances in these respects, or either of them, and a failure to have a watchman at the crossing, combined in producing the injury, then plaintiff was entitled to recover. The instruction means this, and nothing more, for it is clearly stated that, to recover, he must have been using ordinary care. If, without fault of the plaintiff, he should be injured by the joint negligence of defendant and a third person, he would have a cause of action against the defendant. For a much stronger reason may the plaintiff recover where he is injured by two or more negligent acts of the defendant.

4. Witnesses on the part of the plaintiff testified that they did not hear the bell of the engine, whilst those for the defendant testified in positive terms that it did ring. With this negative evidence on the side of the plaintiff, and the positive evidence on the side of the defendant, the contention is, that defendant's evidence should have prevailed, and the court erred in submitting this question to the jury. *Isaacs v. Skrainka*, 95 Mo. 517, states the true rule; namely, where the witnesses are of equal credit, the positive evidence that the bell was ringing is, as a general rule, entitled to more weight than that of witnesses who say they did not hear it. Much depends upon the situation and position of the witnesses and the attention they were giving at the time. All these matters and the credit to be given to the witnesses were questions for the jury to consider, and the ultimate question whether the bell was ringing or not was one of fact, and was properly submitted to the jury.

5. The evidence shows beyond all controversy that there was no flagman at the crossing, and this violation of the ordinance was negligence *per se*. A flagman at his post and in the performance of his duty would doubtless have avoided the calamity. The real question of fact in the case was whether plaintiff was guilty of contributory negligence. The evidence on this question is voluminous and conflicting; the instructions given at the request of the defendant are full and fair, and those given at the request of the plaintiff proceed upon the hypothesis that he was using ordinary care.

The real question in the case was fairly submitted, and the judgment should be and is affirmed.

NEGLIGENCE, BURDEN OF PROOF RESPECTING. — The burden of proving negligence is upon him who alleges it: *Pawling v. Hoskins*, 132 Pa. St. 617; 19 Am. St. Rep. 617, and note; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118; 19 Am. St. Rep. 475.

NEGLIGENCE — QUESTION OF FACT. — Negligence is ordinarily a question of fact to be determined by the jury: *Weber v. Kansas City C. R'y Co.*, 100 Mo. 194; 18 Am. St. Rep. 541, and note; *McMarshall v. Chicago etc. R'y Co.*, 80 Iowa, 757, *ante*, p. 445, in which case it is decided that in an action to recover for an injury received by being struck by an engine, the evidence being conflicting in its nature, the question as to whether defendant was negligent in failing to give the proper signals is properly for the jury.

RAILROAD COMPANIES, DUTY OF, TO PERSONS ON OR ABOUT TO COME UPON THEIR TRACKS: See note to *McMarshall v. Chicago etc. R'y Co.*, *ante*, pp. 452, 453.

MARTIN v. RATCLIFF.

[101 MISSOURI, 251.]

MORTGAGES — RIGHT OF PURCHASER UNDER FORECLOSURE TO IMPROVEMENTS

— **FORM OF DECREE FOR REDEMPTION.** — A purchaser in good faith at a foreclosure sale, under the belief that he acquired a perfect title, is entitled, as against the redemptioner, to the full value of improvements made by him, though they may exceed those which a mortgagee in possession is ordinarily justified in making. The rule that a mortgagor cannot be improved out of his estate does not apply to such a case, and the decree permitting redemption may provide that, unless the redemption money is paid within a certain time, the mortgage shall stand foreclosed, without a further order that in case of default in payment the property shall be sold.

James A. Spurlock, for the plaintiffs in error.

B. R. Richardson, and Draffen and Williams, for the defendants in error.

BLACK, J. On the 20th of August, 1859, Jeremiah Ratcliff mortgaged 520 acres of land in Morgan County to John A. Powell to secure a debt of \$2,959. Ratcliff died in 1863, and in 1865 Powell, acting by an agent, sold the land under a power of sale in the mortgage. In 1880, fifteen years after the sale, the plaintiffs, who are heirs of Ratcliff, brought this suit to redeem.

There are a great number of defendants who have purchased parcels of the property from the persons who purchased at the mortgagee's sale. It is said there is a small village on a part of the land; but the record furnishes only an intimation of the fact. The court made an interlocutory decree to the effect that plaintiffs were entitled to redeem, and appointed

a referee to state an account. Upon the incoming of the referee's report, the court made a decree that plaintiffs be allowed to redeem by paying into court the sum of \$16,849 on or before a given date, and if payment should not be made by that time, then the mortgage should stand foreclosed. Plaintiffs filed exceptions to the referee's report, a motion for new trial, and a motion in arrest, all of which were overruled. They then sued out this writ of error. The evidence is not preserved. In short, there is no bill of exceptions in the record.

The court, by the interlocutory decree, directed the referee to charge the plaintiffs with the value of the improvements placed upon the property by the defendants, and to charge defendants with rents, not including rents upon the improvements made by them. Plaintiffs object that by this statement of the account they are improved out of their property.

It is to be observed, in the first place, that no objection was made to the order for an accounting. Again, the plaintiffs having filed no bill of exceptions, the exceptions to the referee's report and the motion for a new trial are no part of the record. The questions which the plaintiffs seek to raise are therefore not fairly before us.

But aside from this, we see no error in the directions as to the accounting. As we understand this very imperfect record, the deeds executed by the mortgagee do not disclose the fact that he made the sale by an agent. The finding of the court is, that the defendants purchased in good faith, believing that they acquired a perfect title. The character of the improvements is not disclosed by the record, yet the amount which the plaintiffs were required to pay, in order to redeem, leads to the conclusion that the improvements are far in excess of any ordinary use of the land for farming purposes. The improvements may have been in excess of those for which a mortgagee in possession is ordinarily allowed compensation. But so far as an accounting is concerned, the defendants do not stand in the exact attitude of one in possession as an avowed mortgagee. Having purchased in good faith under the belief that they acquired a perfect title, they are entitled to the full value of the improvements, though they may exceed those which a mortgagee in possession is ordinarily justified in making: 2 Story's Eq. Jur., 13th ed., sec. 1237; *Mickles v. Dillaye*, 17 N. Y. 80.

The doctrine embodied in the expression that a mortgagor

cannot be improved out of his estate has no application to a case like the one in hand. The defendants were not entitled to have and were not allowed interest on moneys invested in the improvements, and on the other hand, they should not be charged with rents on the improvements made by them.

A further point is made, that the decree is illegal because it amounts to a strict foreclosure. It does not provide for a sale, but says if the amount required to be paid by way of redemption is not paid within the time named, then the mortgage shall stand foreclosed. Such a decree is, in effect, the same as one providing that if the money is not paid within the specified time, then the bill shall be dismissed, at the costs of the plaintiffs; for it seems that a decree in the latter form, followed by a dismissal, will operate as a foreclosure: 2 Jones on Mortgages, 4th ed., sec. 1108.

Bollinger v. Chouteau, 20 Mo. 89, was a suit brought by the heirs of a mortgagor to redeem. In that case there had been an invalid foreclosure sale, and this court directed the trial court to enter up a decree just like the one now in question. *Davis v. Holmes*, 55 Mo. 350, was a suit to set aside a sale of land made under a mortgage, and for leave to redeem. The decree provided that if the plaintiff did not redeem within a specified time, then the equity of redemption should be sold. The defendant objected that there should have been a strict foreclosure, but this court overruled the objection, and held that the order should have been to sell the land, and not simply the equity of redemption. It was then said that a strict foreclosure is a novelty in proceedings on mortgages in this state. To the same effect is the recent case of *O'Fallon v. Clopton*, 89 Mo. 285, where the question arose on the defendant's answer, asking that a sale made under a deed of trust be set aside.

Jones says the form of the judgment ordinarily is, that the plaintiff may redeem upon paying the amount found due on the mortgage, within a specified time, together with costs; and that upon his doing so the defendant shall discharge the mortgage and deliver up the mortgaged premises; and that upon default of such payment, the complaint be dismissed, with costs: 2 Jones on Mortgages, 4th ed., sec. 1106. Such is the usual form of the decree in suits for the redemption of a mortgage: 2 Daniell's Chancery Practice, 5th ed., 998; *Decker v. Patton*, 120 Ill. 464. In the case last cited, the plaintiff, as in this one, sought to reverse a decree in his own favor because

it did not provide for a sale of the property. Said the court: "Had this been a bill to foreclose a mortgage, and had a decree been rendered cutting off the rights of parties in interest, without a sale of the mortgaged premises, and denying the redemption provided by statute, then there might be force in the argument."

Our statute concerning mortgages and deeds of trust contemplates a sale of the premises in all suits brought to foreclose such instruments, and a strict foreclosure in any such case would be erroneous on its face. There is no doubt but that the court may, on a petition to redeem, direct a sale of the premises in the event the redemption money is not paid within the specified time. And in such cases the sale may be ordered, though there is no specific prayer therefor either in the petition or answer. But it is a different thing to say that a decree is, on its face, erroneous and must be reversed because it does not provide for a sale. The plaintiffs in this case did not ask for a sale of the property in their petition. They did not, by motion or otherwise, ask the court to modify the decree. They have made no showing that a sale can be of any possible benefit to them. If this decree is reversed, it must be upon the ground that in all suits where there is a decree permitting the plaintiff to redeem, there must be a further order that in case of default in payment of the amount found due, the premises shall be sold. This, in our judgment, is not the law, for there is a wide distinction between a suit of foreclosure and one brought to redeem from a voidable foreclosure sale.

Affirmed.

IMPROVEMENTS, RIGHT TO — PURCHASER AT A FORECLOSURE SALE UNDER A MORTGAGE. — A purchaser under a foreclosure sale will be allowed for improvements made by him upon the premises, less the rents and profits which he has enjoyed, upon redemption, where he not only supposed he had a good title and made the improvements in good faith, but the redemptioner stood by and made no objection thereto: *Bradley v. Snyder*, 14 Ill. 263; 53 Am. Dec. 565.

STATE v. MCGONIGLE.

[101 MISSOURI, 253.]

OFFICIAL BONDS — MINISTERIAL ACTS — EVIDENCE. — County courts, in approving official bonds, act in a ministerial and not in a judicial capacity, and parol evidence is admissible to show that the court, when so acting, had full notice and knowledge of the fact that the name of one of the sureties had been erased without the knowledge or consent of the other sureties. Notice to the court, when thus acting, may be shown by evidence which would be sufficient in case of other agents.

OFFICIAL BONDS — SURETY — ALTERATION. — A surety on an official bond has the right to stand upon the very terms of his contract; and any material alteration or variation of its obligation will discharge him, unless he consents to such alteration before it is made, or by some subsequent act ratifies it.

OFFICIAL BONDS — EFFECT OF ERASURE OF NAME OF SURETY. — Where the county court approves an official bond, with full knowledge that the name of one of the sureties has been erased therefrom without the knowledge or consent of the other sureties, the bond is void as to them, as well as to another surety who afterwards signed without knowledge of such erasure.

OFFICIAL BONDS. — **SPOILIATION** of an official bond can occur only when it is the act of a stranger, without the participation of the parties interested; and while county officials having the custody of such bonds are strangers, within the rule, so that defacement of such bonds by them is but an act of spoliation, still, when such bond is altered by them before it is delivered or accepted, the doctrine of spoliation does not apply.

OFFICIAL BONDS — EFFECT OF ERASURE OF NAME OF SURETY — ESTOPPEL. — Where the county court has approved an official bond, with knowledge that the name of a surety thereon has been erased without the knowledge or consent of the other sureties whose names appear thereon, the bond is void as to them; nor are they estopped, by knowledge that the officer, after such approval, entered upon and performed the duties of his office, to deny the validity of the bond, in the absence of evidence that they knew of the erasure.

L. F. Cotley and O. D. Jones, for the appellant.

G. R. Balthrope, and Blair and Marchand, for the respondents.

BLACK, J. The state, as plaintiff, brought this suit against the sureties on the official bond of Peter J. Reid, who was elected collector of Knox County in November, 1884. Reid seems to have paid over the county revenues collected by him, but he made default to the state in the amount of \$14,092, and hence this suit. The case was tried by the court without a jury, the trial resulting in a judgment for the defendants, to reverse which the state prosecutes this appeal.

Many matters of defense were set up in the answers filed by the defendants, and evidence was received in support of them; but the court, at the close of the trial, excluded the evidence

bearing upon these defenses, except that offered in support of that part of the answer which, in effect, states that the bond sued upon is not the obligation of the defendants. This is therefore the only defense before us on this appeal.

In August, 1885, Reid presented to the county court of Knox County a bond in the penal sum of thirty thousand dollars for approval, signed by himself and the following sureties, in the following order: P. H. Early, Patrick Fleming, I. D. McPike, Thomas Bresnen, George Dailing, and Thomas Kearnes. At the same time, Dailing, one of the sureties, appeared before the court, which was then in session, and asked that his name be taken off the bond, assigning as a reason therefor that he signed upon the understanding that James Kelly would also sign, and that Kelly's name had not been procured. The matter was talked over in the presence of the court, and the name of Dailing was erased by the clerk, in the presence of all the judges, and of Dailing and of Reid, but in the absence of and without the knowledge or consent of any of the other sureties. Some of the evidence is to the effect that the erasure was made by the clerk at the instance of the court, the other parties present consenting. The presiding justice then told Reid he must procure other sureties. Thereupon, Reid took the bond, and in one or two days again presented it to the court, with the name of John Cain signed on the line and at the place from which Dailing's name had been erased. The court then approved the bond by an order dated the 4th of August, 1885. Cain, who signed by making his mark, did not know that Dailing had ever been a party to the instrument. The other sureties signed at different dates, and at the office of Reid. Nothing is said about any erasure in the body of the bond, and the inference is, that the names of the sureties had not been inserted at that place when the bond was first presented for approval. Dailing was a substantial property owner, while Cain appears to have been in debt to the amount of the full value of all of his property.

The defendants asked no instructions. The state asked one only on this branch of the case, to the effect that the evidence concerning the erasure of the name of Dailing constituted no defense, which the court refused. The plaintiff is therefore here standing on a demurrer to the evidence of the defendants.

1. The state places much reliance upon the proposition that the circuit court should have excluded all of the parol evi-

dence of what was said and done in the presence of the judges of the county court. This contention is based upon the ground that the acts of the county court can be shown alone by the record. These courts are required to keep a just and faithful record of their proceedings, and must speak by and through the record. The county courts, however, in approving these official bonds, act in a ministerial and not a judicial capacity: *State v. Lafayette Co. Ct.*, 41 Mo. 221, 248; *In re Saline Co. Subscription*, 45 Mo. 55; 100 Am. Dec. 337. They are made the agents of the state and counties for the purpose of accepting such bonds. The parol evidence was not offered in this case for the purpose of showing any order or judgment of the court, but for the purpose of showing that the court had full notice and knowledge of the fact that the name of one of the sureties had been erased, and that, too, without the knowledge or consent of the other sureties. For this purpose, the evidence was properly received. Notice to the court, when thus acting in a ministerial capacity, may be shown by evidence which would be sufficient in case of other agents. It is not to be expected that all the information which the court may have while transacting such business will be spread upon the record. The law does not require it.

2. The plaintiff cites, and with confidence relies upon, a line of authorities, of which *State v. Potter*, 63 Mo. 212, 21 Am. Rep. 440, is the leading one in this court. That was a suit on a bond of Turley, as guardian of certain minors, with Potter and another as sureties. Potter's defense was, that he signed the bond on the condition that it would be signed by one Bothrick as surety, and that it was filed by Turley without having procured the signature of Bothrick. Says the court: "Here the surety who defends this action had invested the principal with an apparent authority to deliver the bond; and there was nothing on the face of the bond, or in any of the attending circumstances, to apprise the official who accepted it that there was any secret agreement which should preclude the acceptance of the bond." The defense was accordingly overruled, and the doctrine of that case, overruling former cases, has been followed in subsequent cases: *State v. Baker*, 64 Mo. 167; 27 Am. Rep. 214; *State v. Modrel*, 69 Mo. 152; *State v. Hewitt*, 72 Mo. 604; *Wolff v. Schaeffer*, 74 Mo. 154. It is now well-established law in this and other jurisdictions that where a surety signs a bond and leaves it in the hands of the principal, to be delivered only upon the condition that it

is signed by another person, and the principal delivers the bond to the obligee without complying with the condition, and the obligee takes it without notice of the conditional agreement, the surety will be bound: *Dair v. United States*, 16 Wall. 1; *State v. Peck*, 53 Me. 284; *Taylor County v. King*, 73 Iowa, 153; 5 Am. St. Rep. 666; *State v. Pepper*, 31 Ind. 76; *Millett v. Parker*, 2 Met. (Ky.) 608. The same rule applies where the surety signs a bond, leaving a blank space for the penalty, and the principal fills it with a larger amount than that agreed upon by the principal surety: *Butler v. United States*, 21 Wall. 274. In these cases of conditional agreements, it is the surety who puts trust and confidence in the principal, and not the obligee; and if any one is to be the loser, it should be the surety, for he puts it in the power of the principal to create the mischief complained of. The bond having been accepted and acted upon, the surety is estopped from setting up an unperformed and undisclosed condition. The cases before cited all proceed upon the ground that there is nothing upon the face of the bond, as disclosed by the attending circumstances, to appraise the obligee, or accepting officer, of a state of facts which should prevent its acceptance.

When the county court accepted the bond in question, it had full knowledge of the fact that the name of Dailing, as one of the sureties, had been erased, and the name of Cain substituted therefor. The circumstances all tend to show that the court knew this had been done without the knowledge or consent of the other sureties. The court was in no manner misled or deceived, and there is no room or ground for the application of any principle of estoppel as against the sureties. The cases before cited, and the principles of law upon which they are ruled, do not meet the question which we are bound to decide in this case.

3. The surety has the right to stand upon the very terms of his contract; and it is well-settled law that any material variation or alteration in the obligation or contract upon which he is bound will discharge him, unless he consents to the alteration before made, or by some subsequent act ratifies it: *Burge on Suretyship*, 214; *Baylies on Sureties and Guarantors*, 260. The principle of law just stated is not controverted by the plaintiff, but its application to the case in hand is denied. It is therefore deemed best to make a concise statement of the facts of some of the cases relied upon by the defendants. *Martin v. Thomas*, 24 How. 315, was a suit upon

a delivery bond executed to a marshal in a replevin suit. After the bond had been executed by the principal and three sureties, the principal, with the consent of the marshal, and without the consent of the sureties, erased his name. This erasure, it was held, constituted a variation of the contract of the sureties, and discharged them from all liability on the bond.

Smith v. United States, 2 Wall. 219, was a suit upon a bond given by Pine, as marshal, the bond having been approved by the district judge. Smith, one of the sureties, defended, on the ground that the bond was not his deed. The evidence showed that Smith, Hoyne, and others had signed the bond as co-securities for Pine. Hoyne became dissatisfied, and requested Pine to erase his name, which was done, but by whom did not appear. The name of Hoyne was erased when the bond was presented to the judge for approval, and the judge had been told by Hoyne that he wanted his name erased. The remaining sureties, except Smith, appeared before the judge, and acknowledged the execution of the bond. Smith did not acknowledge it, and did not know that Hoyne's name had been erased. It was held that the sureties who acknowledged the bond after the erasure were estopped from interposing the alteration as a defense; but as to Smith, it was held that the erasure was a material alteration of the obligation to which he became a party, and that he was therefore discharged.

The suit in *State v. Craig*, 58 Iowa, 238, was upon the bond of the warden of the penitentiary. There were some eleven sureties as the bond stood when produced in evidence, and the defense was material alteration. The evidence showed that one Smith signed it as a surety after the first seven signatures had been obtained, and the other sureties signed after Smith. Before the names of the sureties had been inserted in the body of the bond, and before approval, Smith's name was erased without the consent of any of the other sureties; the person signing before Smith did not know that he had signed until after the suit had been commenced. It was held that though Craig, the principal, had been intrusted with the bond to procure signatures and present it for approval, yet as to the sureties signing subsequent to Smith, Craig was not authorized to deliver the bond after it had been altered to their prejudice, and that those sureties were discharged because the instrument sued upon was not their contract. The sureties

who signed before Smith were also discharged, on the ground that it would be presumed that they signed with the understanding that other sureties would be procured in such a way that all would be held and bound as co-sureties.

In the case of *Bracken Co. Comm'rs v. Daum*, 80 Ky. 388, the suit was based upon a sheriff's bond, and the defense was *non est factum*. Ten persons signed a power of attorney authorizing the county clerk to sign their names to the bond. At least two of the names were erased before the power of attorney was delivered to the clerk. It was held that if the names were erased without the knowledge or consent of the other sureties, and with the knowledge or by the direction of the county judge, whose duty it was to take and approve the bond, then the plaintiff could not recover. The court said, in substance, that it was the duty of officers intrusted with authority to take and approve official bonds, to use ordinary care and prudence to protect the sureties as well as to protect the public.

Here the bond, when first presented to the county court for its approval, was a completed bond. As then presented, it expressed the contract of the sureties. They agreed to be jointly and severally bound, but they did not agree that the name of Cain should be substituted for that of Dailing. The alteration in the obligation was a material one, and was made in the presence of the county court and without the knowledge or consent of the sureties, and the bond, as approved, is not the obligation of the defendants. The authorities cited are in point, and all lead to the conclusion just stated. Some of them, and others which we have not cited, go further in favor of the discharge of sureties than we are disposed to go. If the name of Dailing had been erased and that of Cain substituted without the knowledge of the county court, then we have no hesitancy in saying that the sureties should not be discharged, because, by intrusting the bond to Reid, they put it in his power to mislead and deceive the court, and they should suffer the consequences. Here the court was not misled, but accepted the bond, knowing that it had been altered without the knowledge or consent of the other sureties. Under these circumstances the court had no right to disregard the rights of the other sureties.

The argument is made that when these sureties signed the bond and left it with Reid, the principal, to procure other signatures and present it to the county court, they thereby

made him their agent, and are bound by his acts. It is to be remembered that the county court had full knowledge of all of the facts, so that the argument, to have any bearing upon this case, must go to the extent of saying that Reid had invested in him the right to discharge at pleasure any one or more of the persons who became parties to the bond; that for this purpose, he could of right represent the sureties as well as himself. This is carrying the doctrine of implied powers entirely too far. Each of the sureties when signing the bond and leaving it with Reid did, doubtless, make him their agent for the purpose of procuring other sureties and for the purpose of presenting the bond for acceptance and approval. But it cannot be said they thereby gave him authority to discharge any one who had or might thereafter become a party to the obligation. As said in *State v. Craig*, 58 Iowa, 238, the principal was not authorized to deliver the instrument after it had been altered to the prejudice of the sureties. Nor does the fact that the sureties knew the bond had to be approved furnish any ground for the inference that they authorized the alteration: *Smith v. United States*, 2 Wall. 219.

It is true, the defendant Cain signed the bond after the alteration had been made, but the evidence is to the effect that he was wholly ignorant of the fact that Dailing had ever been a party to the bond. As to him, the bond is void because he signed it upon the supposition that the other parties were in fact co-sureties, and he never undertook to become the sole surety: *Howe v. Peabody*, 2 Gray, 556. But it is further argued that the erasure of Dailing's name was spoliation only, and did not affect the liability of any one on the bond. If the bond had been delivered, and the erasure thereafter made by county officials, then *Medlin v. Platte County*, 8 Mo. 235, 40 Am. Dec. 135, would be an authority for the position thus taken by plaintiff. It is, in effect, said in that case that the term "alteration" is usually applied to the act of a party entitled under the instrument, and imports an improper design, but spoliation is the act of a stranger without the participation of a party interested. It is also held that county officials who have the custody of instruments in writing are strangers within the meaning of the rule, so that if these officials deface such instruments, their acts are but spoliation. To the same effect is *State v. Berg*, 50 Ind. 496. Here there never was a time when the state or county held Dailing as a surety: for the evidence is all to the effect that his name was erased be-

fore the bond was delivered or accepted. The question in this case is, whether the bond sued upon is the deed of the sureties, and we do not see that the doctrine of spoliation has anything to do with this controversy.

4. The plaintiff insists that the court erred in refusing an instruction to the effect that if the bond was approved by the court on the 4th of August, 1885, and the defendants knew that Reid occupied the office of collector, and collected the revenues for the years 1885 and 1886, and made no objection thereto, then they are estopped from making the defense that the bond was altered by the erasure of Dailing's name.

There is an abundance of evidence tending to establish all facts stated in this refused instruction, but there is not a word of evidence tending to show that the defendants during this time knew that Dailing's name had been erased. The only evidence to which our attention is called is, that they knew nothing about the erasure. An estoppel cannot arise until it is shown that they knew of the alteration and thereafter made no objection to the performance by Reid of official duties by virtue of having given the bond in question. No such state of facts is shown or hypothetically stated in the instruction, and it was therefore properly refused.

It is useless to notice the other minor suggestions made by the plaintiff. They do not meet the real and only question in this case. The case has been twice argued, and we can come to no other conclusion than that before indicated. We have endeavored to lay it down as the better law that sureties on these official bonds ought not to be discharged until they show knowledge, on the part of the accepting officers, of a state of facts which should have precluded the acceptance of the bond, be it a conditional contract between principal and surety, or an alteration of the bond as executed by the surety. That has been done in this case. Common information, without any special knowledge of the law, ought to have told these county judges that it was an improper thing to strike off the name of one of the sureties without the consent of the other sureties.

The judgment is affirmed.

THE CASE OF *State v. Findley*, 101 Mo. 368, was an action brought against defendant on his official bond as collector of revenues, and against Reid and Summers as his sureties. The defense of the sureties was *non est factum*. A demurrer to plaintiff's evidence was sustained, and judgment rendered in favor of the sureties.

At a regular term of the county court, the bond of the defendant collector was produced, and approval thereof asked. This was refused because one of the sureties therein named (P. W. Gully) was a judge of the court. The presiding judge handed the bond to the collector, with instructions to get another name in the place of Judge Gully. Either the clerk of the court or Findley then scratched Judge Gully's name from the bond, in the presence of the judges, and one Cooper signed his name in the place of the name thus erased.

The bond, with this alteration, was offered in court the next morning for approval, and thereupon approved.

Judge Gully, at the time his name was erased from the bond, and up to the time of the trial, was solvent, and the sureties, Reid and Summers, were not present in court upon either of said days. Gully's name was upon the bond when signed by Reid and Summers, and its erasure and the insertion of Cooper's name was without their knowledge or consent.

As the facts of this case fell clearly within the rule laid down in the principal case, it was decided, on the authority of that case, that the sureties were not liable. A question not raised in the McGonigle case was raised in this, to the effect that the erasure of the name of Gully could only operate, at most, to discharge the sureties to the extent of the *pro rata* share for which said Gully would have been liable; but it was determined that such sureties had a right to stand upon the exact terms of their contract, and that a material alteration, such as is shown in this case, made the bond void as to them.

The question of waiver, ratification, or estoppel was also raised in this case, and claimed to be shown by the subsequent acts and declarations of the sureties, Reid and Summers. This claim was based on conversations between them and Gully and Cooper; as, for example, Cooper testified that they said to him, about the end of the first year of Findley's term of office, "You are on Findley's bond"; but there was nothing to show that their mere knowledge that Cooper had signed the bond after they had attached their names thereto also notified them that Gully's name had been erased and that of Cooper substituted therefor. Cooper also testified that he told Summers during the first year of Findley's official term that he was on his bond; but he did not tell him that Gully's name had been erased, and that the first time that he ever heard Reid or Summers say anything about Gully's name not being on the bond was about the time of Findley's failure. Gully testified that they consulted him about strengthening the bond, so that there is nothing in the claim of estoppel from a failure to consult him about protecting themselves.

It was also claimed that Reid and Summers's knowledge of the erasure of Gully's name was shown by the evidence of one Dryer, who was one of the judges of the county court at the time the bond was approved, and who testified that during the first year of Findley's term Reid and Summers said to him that "they were the only men on the bond worth a damn." It is claimed that as Gully was solvent at all times, they would not have said this if they considered him on the bond. The other evidence shows, however, that they were then, as well as afterwards, anxious about their liability on the bond, and contemplated steps to protect themselves. They were both active in their efforts to get a meeting of all the sureties, in order to get some action taken by the court in respect to the bond, but in this were not successful; and it is claimed on their behalf that the remark alluded to was made in that connection, and not relative to the solvency of the sureties. There is no evidence in the case to show that either Reid or Summers knew of the erasure

of Gully's name prior to the failure of Findley, while there is plenty of evidence that at about that time, when told that his name had been erased, they expressed surprise, and claimed that if his name was not there, the bond was not theirs, as he had signed it before they did; and while they acted, on some occasions, as if they thought themselves liable, and may have said or implied as much at various times, still this was entirely consistent with their ignorance of the erasure.

One witness testified that shortly before suit was brought on the bond he discovered the erasure, and showed the bond to Reid and Summers, who examined it with a spy-glass. Cooper was present, and told them that Gully's name was erased, and witness told them that Cooper was right.

The court concluded as follows: "Beyond this, there is nothing in the evidence pertinent to the question under review. The plaintiff, in insisting upon the waiver or ratification, has the burden of proof. It is often said that the words or acts relied upon as amounting to a ratification must be affirmative in character, and sufficient to amount to the making of a new contract: *State v. Churchill*, 48 Ark 426; *Winsor v. Lafayette Co. Bank*, 18 Mo. App. 665; *Middletown v. Kansas City etc. R. R. Co.*, 62 Mo. 579; *German Bank v. Dunn*, 62 Mo. 79; *Cravens v. Gillilan*, 63 Mo. 28; *Miller v. Gilleland*, 19 Pa. St. 119; *Evans v. Foreman*, 60 Mo. 449. Under a liberal interpretation of the evidence, and one most favorable to plaintiff's case, it manifestly fails to meet the requirements of the rule just mentioned. As was said in *State v. McGonigle*, 101 Mo. 353, an estoppel cannot arise against the defendants until it is shown that they knew of the alteration, and thereafter made no objection to the performance by the collector of the official duties by virtue of having given the bond in question. Plaintiff's evidence, we think, fails to make out a case of this sort, and we therefore affirm the judgment, and so order, in which Black and Brace, JJ., concur; Sherwood, J., dissents; Barclay, J., absent."

SURETIES, DISCHARGE OF. — The contract of suretyship is construed strictly in favor of the surety; he has a right to stand upon the very terms of his contract, and any alteration therein made without his consent is fatal to his obligation, whether he is injured thereby or not: *Anderson v. Bellen-ger*, 87 Ala. 334; 13 Am. St. Rep. 46.

OWEN v. BAKER.

[101 MISSOURI, 407.]

SHERIFF'S DEED AS EVIDENCE ON COLLATERAL ATTACK. — A sheriff's deed which recites a judgment against three defendants, and a direction to levy against one only, whose land is levied upon and sold, is sufficient in a collateral proceeding to support the sheriff's sale in pursuance of which the deed was made.

SHERIFF'S DEED — RECITALS — TIME OF COMMENCEMENT OF LIEN. — The time fixed by law for the commencement of a judgment lien cannot be changed by the recitals in a sheriff's deed.

SHERIFF'S DEED — ACKNOWLEDGMENT. — Where the clerk of the circuit court is also recorder of deeds, the addition in the acknowledgment of a sheriff's deed of the word "recorder," after the name of the clerk, will not vitiate the deed.

OFFICE AND OFFICER — PRESUMPTION. — Public officers are always presumed to perform the duties required of them by law.

SHERIFF'S DEED. — **CERTIFICATE OF ACKNOWLEDGMENT** of sheriff's deed may be supported by reference to the language of the conveyance itself.

EJECTMENT. At the trial, plaintiff offered in evidence a sheriff's deed which the court excluded, and its exclusion forms the only question presented. The deed read as follows: —

"This indenture, made and entered into this twenty-first day of November, eighteen hundred and forty-two, between William P. Burney, sheriff of Van Buren County, in the state of Missouri, of the first part, and William R. Owen, of the county of Henry and state of Missouri, of the other part, witnesseth, that whereas on the seventh day of October, 1842, a certain writ of execution did issue formal out of the circuit court of Van Buren County, in the state of Missouri, to the sheriff of Van Buren County directed, reciting that whereas on the twenty-second day of March, in the year of our Lord 1842, at our Van Buren circuit court, William R. Owen hath recovered against James Sullivan, William Sullivan, and Mason Sullivan the sum of seventy-five dollars and forty-seven cents, for his debts and also for his costs. The sheriff was therefore commanded that of the goods and chattels and real estate of said defendant he cause to be made the debt and cost aforesaid, and that he certify how he executed the said writ, and whereas, the said sheriff, on the tenth day of October, eighteen hundred and forty-two, in pursuance of the command therein contained, the said sheriff levied the same upon the lands of James Sullivan and of the said defendants lying and being in the county of Van Buren, to wit, the southwest quarter of the southeast quarter of section twenty-three, township forty-one, range twenty-nine. And whereas the said sheriff did afterwards proceed to give at least twenty days' notice by six handbills put up in public places in different parts of the county of Van Buren, containing a description of the lands to be sold, and the time and place of the sale, and whereas, in pursuance of said notice, the said sheriff did, on the first day of the November term of Van Buren circuit court, 1842, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon, offer for sale, by public auction, for ready money, at the court-house door in the town of Harrisonville, in Van Buren County, the said land of the said James Sullivan, one of said defendants, to the highest bidder,

William R. Owen became the purchaser, for the sum of thirty-five dollars, it being the highest and best sum bid for the same. Now, therefore, I, the said William P. Burney, sheriff of Van Buren County aforesaid, for and in consideration of the sum of thirty-five dollars to me in hand paid, the receipt whereof is hereby acknowledged, do hereby and by these presents convey unto the said William R. Owen the lands aforesaid, and all the right, title, and interest which the said James Sullivan had in and to said land on the twenty-first day of November, 1842, to have and to hold the land aforesaid, unto him, the aforesaid William R. Owen, and his heirs and assigns forever, in as full and absolute a manner as I, the said William P. Burney, sheriff of Van Buren County aforesaid, could or ought to do. In testimony whereof I, the said William P. Burney, sheriff of Van Buren County, as aforesaid, have hereunto set my hand and seal the day and year aforesaid.

"[Seal.]

WILLIAM P. BURNEY,
"Sheriff of Van Buren County."

"State of Missouri,
County of Van Buren. } ss.

"Be it remembered that on the seventh day of October, in the year of our Lord 1843, personally appeared in open court William P. Burney, sheriff of Van Buren County, who is personally known to the court here to be the person whose name is subscribed to the within and foregoing deed as a party thereto, and acknowledged the said deed to be his act and deed for the purposes therein mentioned. In testimony whereof I have hereunto set my hand and the seal of said court at office at Harrisonville, this eleventh day of October of A. D. 1843.

JAMES C. JACKSON,
"Recorder."

"NOTE. — The foregoing instrument of writing was delivered to me for record on the seventh day of October, A. D. 1843, and by me duly recorded this thirty-first day of October, 1843.

"JAMES C. JACKSON,
"Recorder."

James T. Smith and James B. Gantt, for the plaintiff in error.

P. H. Holcomb, for the defendant in error.

BARCLAY, J. The admissibility in evidence of the sheriff's deed, set forth in the statement accompanying this opinion, is denied on several grounds, which will be considered in their order.

1. It is claimed that it recites a judgment against three defendants, and a direction to levy against one only.

As the levy was actually made on the land of James Sullivan, the one defendant named, and his land sold accordingly, the error or irregularity, if any there is, in the recital in this particular is not such as to vitiate the sale in a collateral proceeding: *Blake v. Blanchard*, 48 Me. 297; *Morse v. Dewey*, 3 N. H. 535.

2. Next, it is asserted that the deed affirmatively limits the title conveyed to such interest as James Sullivan had therein November 21, 1842, while it is admitted that he had conveyed away his interest in the land levied upon to Mr. Page October 21, 1842.

But the judgment (on which the sale was predicated) was of date in March, 1842, and the law then in force provided that the lien of judgment should begin when the latter was rendered (R. S. 1835, 3d ed. 1840, p. 339, sec. 3), and that upon execution might be sold the "real estate whereof the defendant, or any person for his use, was seised in law or equity on the day of the rendition of the judgment, order, or decree, whereon execution issued, or at any time thereafter": R. S. 1835, 2d ed. 1840, p. 256, sec. 17.

The sheriff's deed recites a levy on James Sullivan's lands, and purports to convey them, but then adds, in substance, that the interest conveyed dates from November 21, 1842, only. It was not within the power of the sheriff making the sale to limit the meaning of his general transfer of defendant's title by such an *addendum*. The law gave an effect to the general terms used in the conveyance by passing such estate as the execution debtor had at the time of the judgment, and the further language used did not destroy that effect.

Even in respect to the recitals which the law directs to be made (R. S. 1835, 2d ed., p. 259, sec. 45), it is not every error or mistake that will vitiate such a conveyance collaterally: *Buchanan v. Tracy*, 45 Mo. 437; but only such as affect the power to sell and regularity of the sale: *Buchanan v. Tracy*, 45 Mo. 437.

3. Another objection to the deed in question relates to the sufficiency of its acknowledgment. The statute required it to be made before the circuit court of the county wherein the estate was situated, and that the clerk of said court should indorse upon such deed a certificate, etc., "under the seal of the

court." It is claimed that the acknowledgment does not comply with the law in these particulars.

Under the statutes then in force, the clerk of the circuit court was also recorder of deeds: R. S. 1835, 3d ed., p. 525, sec. 2.

Of this fact our courts will take judicial notice, as part of the history of legislation in this state. Jackson, who signed the certificate, was recorder only by virtue of his office as circuit clerk. His description of himself, therefore, as recorder indicated likewise that he was circuit clerk, and, with the recitals in the acknowledgments, make it clear that it was taken by him as clerk. As circuit clerk he was authorized to take the acknowledgment, but as recorder he had no such authority: R. S. 1835, 2d ed., p. 120, sec. 8.

The presumption always is, in the absence of any showing to the contrary, that public officers perform their duties rightly. In this case the acts of the sheriff and court described in the certificate of Jackson were valid if performed before him as circuit clerk, but not as recorder.

Had the word "recorder" (after his signature) been omitted, the matter would be too clear for discussion. We regard it, in the present instance, as a mere description of the official person whom the law also designated as circuit clerk as well as recorder.

In support of a certificate of acknowledgment, reference may be properly made to the language of the conveyance itself: *Carpenter v. Dexter*, 8 Wall. 515; *Chandler v. Spear*, 22 Vt. 388; *Bradford v. Dawson*, 2 Ala. 203; *Sharpe v. Orme*, 61 Ala. 263; *Wells v. Atkinson*, 24 Minn. 161. By giving proper force to it, and to the presumptions attaching to the acts of public officers, we have no doubt of the validity of the acknowledgment in the particular referred to.

That the deed and certificate sufficiently show that the acknowledgment was made before the circuit court of Van Buren County is settled by the ruling in *Sidwell v. Birney*, 69 Mo. 144.

In fine, we regard the objections assigned to the admission of the deed untenable. They should be overruled. Hence we all agree that the judgment be reversed, and the cause remanded for further proceedings.

OFFICE AND OFFICERS — PRESUMPTION. — The presumption is, that public officers have properly performed the duties required of them by law: *National Bank v. Herold*, 74 Cal. 603; 5 Am. St. Rep. 476, and note; *Blodgett v. Perry*,

97 Mo. 263; 10 Am. St. Rep. 307, and note; *Washington v. Hosp*, 43 Kan. 324; 19 Am. St. Rep. 141, and note; *McDonald v. Frost*, 99 Mo. 44; *Gordon v. Donahue*, 79 Cal. 501.

ACKNOWLEDGMENTS. — The certificate of acknowledgment to a deed must be sustained, if possible; and to support it, reference may be had to the instrument to which it is attached: *Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108; compare extended note to *Livingston v. Kettelle*, 41 Am. Dec. 168-184, upon acknowledgments, generally.

SHERIFF'S DEED — COLLATERAL ATTACK. — Where the judgment and execution are valid, a sheriff's deed based thereupon cannot be collaterally attacked: *Stetson v. Freeman*, 35 Kan. 523.

STATE v. NORMAN.

[101 MISSOURI, 520.]

CRIMINAL LAW — LARCENY. — **GUILTY KNOWLEDGE** or participation is essential to the conviction of one who assists in the commission of a larceny.

CRIMINAL LAW — LARCENY — INSTRUCTIONS. — Where, upon the trial of a charge of grand larceny, the evidence will only sustain a conviction of petit larceny, the jury must be charged both as to grand and petit larceny. It is error to charge to convict of grand larceny, or to acquit.

L. D. Seward, for the appellant.

John M. Wood, attorney-general, for the state.

BRACE, J. The defendant, upon his trial in the St. Louis criminal court upon an indictment for grand larceny, was found guilty, and on the fourth day of January, 1890, was sentenced to two years' imprisonment in the penitentiary, in accordance with the verdict rendered in the case. From this judgment he appeals. The offense with which he was charged, and of which he was convicted, was stealing one overcoat, of the value of thirty dollars, the property of one Joseph Samuels.

The evidence for the state in chief tended to show that on the 2d of November, 1889, the said Samuels and the defendant were inmates of the city jail of St. Louis, the defendant's cell being on the first and Samuels's on the second floor; that Samuels was the owner of a light spring overcoat, for which he had paid thirty dollars, when new, about a year and a half before; that it was in his cell that morning; that his cell door was open all the afternoon of that day, and that he was out on the promenade or in the rotunda on the first floor until five, P. M.; that about that time he returned to his cell, found his coat gone, and reported his loss to the guards; that about 4:30, P. M., the defendant's wife came to the jail, bringing him

his supper, and remained at the screen door while the same was taken to her husband's cell by one Clark, another prisoner; that while Clark was in the defendant's cell, Jacobsen and Seigel, two other prisoners, came into defendant's cell, "Seigel carrying a bundle in his arms, wrapped up in a newspaper," which he placed on the bunk, Jacobsen saying to defendant, "Send that out for me"; that defendant, without looking in this package, gave "that and another small package to Clark," who carried them to the screen, and passed them out to Mrs. Norman in the basket in which she had brought her husband's supper; after the basket was passed out, defendant came to the screen, and his wife hallooed to him, saying: "What is this in here?" and he replied, "It is a bundle of my dirty clothes"; that directly after Samuels reported the loss of his overcoat.

One of the guards went to Norman's house, met his wife on the sidewalk, and demanded the package defendant had sent out to her; she went in the house, brought out the bundle, still wrapped up, and handed it to him; he took it to the jail, where it was found to be the overcoat which Samuels had lost.

The evidence for the defendant elicited on cross-examination of the state's witnesses, and supplemented by his own evidence and witnesses examined in his behalf, tended to prove that Jacobsen and Seigel occupied a cell upon the first floor, and that the coat was taken from Samuels's cell, on the second floor, by Jacobsen, to their cell on the lower floor, was by Seigel wrapped up and taken to the defendant's cell (Jacobsen accompanying him), and that the same was passed out, through Clark and the guard, at the screen, to defendant's wife, as before stated, to be by her pawned for Jacobsen, the defendant not knowing what the bundle thus passed out contained.

There was no evidence tending to show that defendant took the coat, and the only hypothesis on the evidence which would have authorized a conviction was, that he may have been accessory to the theft. Nevertheless, the court instructed as if there was evidence tending to show that the defendant actually took the coat, and gave the following instruction upon the theory of his being accessory to the theft:—

"2. If you believe and find from the evidence that the defendant, Norman, aided or assisted Seigel or Jacobsen in stealing, taking, and carrying away the coat charged, and if you find he did any act in furtherance of the commission of such larceny, you will find him guilty as charged."

This instruction assumes that Seigel or Jacobsen stole the coat, but waiving a legitimate objection to it on this score, it entirely ignores the defense, and instructs the jury that if the defendant by any act, however innocent, aided either of them in the commission of the larceny, they must find him guilty. Under this instruction, the jury finding that the act of defendant, in passing the bundle which Seigel brought to his cell, to Clark, to be delivered with his own bundle to his wife, aided them in carrying off the stolen coat, they must find the defendant guilty, although he may have not known that the coat was in the bundle, may not have known that either Seigel or Jacobsen had taken the coat, or that the coat had been taken feloniously, or of any circumstance that would lead him for a moment to suspect that he was engaged in assisting in the perpetration of a larceny. His act may have aided Seigel and Jacobsen in the accomplishment of their guilty purpose, but unless he was cognizant of that purpose, and knowingly assisted its accomplishment, he could not have participated in their crime, and it was error to instruct the jury that they could find him guilty, without such knowledge or participation.

The court also erred in its instruction to find the defendant guilty of grand larceny, or acquit him. The only evidence on the subject of the value of the coat was, that Samuels paid thirty dollars for it some eighteen months before it was taken. This evidence tended to prove that this second-hand coat at the time it was taken was worth less than thirty dollars, rather than that it was worth that amount or more; but conceding that this evidence, in connection with the fact that the coat was before the jury, warranted an instruction on grand larceny, it certainly called also for an instruction on petit larceny, to give which, however, the court neglected. Without further discussion of the instruction, it is evident that, for the errors noted, the judgment herein must be reversed, and defendant discharged, and it is accordingly so ordered.

LARCENY — CRIMINAL INTENT. — To constitute the offense of larceny, the defendant must be guilty of a criminal intent: *Mead v. State*, 25 Neb. 444; *People v. Stewart*, 80 Cal. 129. The presence of a guilty knowledge on the part of the defendant is necessary: *State v. Boyd*, 36 Minn. 538; *Knowles v. State*, 27 Tex. App. 503. One cannot be guilty of the offense of receiving stolen goods, in the absence of a guilty knowledge: *Holt v. State*, 86 Ala. 599; *Cobb v. State*, 76 Ga. 664. When to the commission of an offense a knowledge of certain facts is essential, then ignorance of these facts is a good defense: *Note to Farrell v. State*, 30 Am. Rep. 617-620.

VAN RAALTE v. HARRINGTON.

[101 MISSOURI, 602.]

FRAUDULENT CONVEYANCES. — RELATIONSHIP BETWEEN INSOLVENT DEBTOR and preferred creditor is a fact to be considered by the jury on the question of intent to defraud creditors.

FRAUDULENT CONVEYANCES. — DIRECT OR POSITIVE EVIDENCE of knowledge or notice by a vendee of his vendor's intended fraud on creditors is not required, but may be inferred by the jury from circumstances. While facts which would put a prudent person upon inquiry will be evidence from which the inference may be drawn, still the jury must be left to draw the inference.

FRAUDULENT CONVEYANCES — BONA FIDE PURCHASER FOR VALUE. — When a sale of goods is attacked as fraudulent, against the creditors of the vendor, and the vendee has paid a valuable consideration and has taken immediate possession, the burden of proof is on the attacking creditor to show affirmatively that the vendee was not a *bona fide* purchaser, and that he in some way participated in the intended fraud. Proof that he purchased with notice of facts sufficient to put a prudent man on inquiry is not sufficient to charge him with constructive notice of the fraud.

FRAUDULENT CONVEYANCES — VENDEE'S NOTICE OF FRAUDULENT INTENT. — Where the vendee has paid a valuable consideration, and it is sought to avoid the sale on the ground that he had notice or knowledge of a fraudulent intent on the part of the vendor, the question to be determined by the jury is, whether he had knowledge or notice of the fraudulent purpose of the vendor, and not whether he had knowledge of facts which would put a prudent person on inquiry and lead to a discovery of the fraud.

Alexander Martin and J. S. Laurie, for the appellant.

Lee and Ellis, David Goldsmith, and Albert Arnstein, for the respondent.

BLACK, J. This is a controversy over a stock of merchandise consisting of dry-goods, notions, clothing, hats and caps, and boots and shoes. Adolph Lederer, being the owner and in possession of the goods, sold the same to Samuel Van Raalte, who took immediate possession. Thereupon the defendant, as sheriff of St. Louis, levied upon the property by virtue of several writs of attachment sued out by the mercantile creditors of Lederer. Van Raalte then commenced this action of replevin, gave bond, and reacquired possession. The sheriff defends on the ground that the sale was one made in fraud of creditors, and that plaintiff purchased with full knowledge of the intended fraud.

Plaintiff was a pawn-broker and dealer in jewelry, and to a limited extent in other merchandise, at Fourth Street, in the city of St. Louis; he had associated with him his step-father, Julius Van Raalte, as a partner in the profits of the business.

Lederer carried on a mercantile business at Chouteau Avenue, in the same place. The evidence of plaintiff and of Julius Van Raalte is, that Lederer came to their store and proposed to sell his entire stock of goods, saying he was old, feeble, and not capable of transacting business; that he wanted to sell out, straighten up his affairs, and quit business. Julius Van Raalte examined the goods and made a report to the plaintiff, and the parties then commenced taking an invoice. All this occurred on the 2d of October, 1886.

The invoice, which amounted to something over eleven thousand dollars at cost prices, was completed on the 6th of the same month. Lederer then offered to take seventy-five cents on the dollar, and Julius Van Raalte offered sixty-five, and the trade was closed at the last-named price. The parties then went to the Fourth Street store, where plaintiff paid \$7,213 for the goods, in cash over the counter, and Lederer gave to the plaintiff full and complete possession of the property. Subsequently, Lederer paid from the proceeds arising from the sale a note due at bank for five hundred dollars, on which his son-in-law was surety. He paid to his son Emil, a young man twenty-eight years of age, four thousand eight hundred dollars, and to his other son, Samuel, twenty-two years old, fifteen hundred dollars. He applied about two hundred dollars in payment of other debts. The evidence of the Lederers is, that the father owed the sons the above-named amounts for services and for moneys advanced. A few days before the sale to plaintiff, Lederer turned over to a son-in-law goods costing three thousand dollars, to secure a debt of two thousand dollars. These goods were placed in an auction-house, and were subsequently sold to pay that debt. The above transactions left Lederer without property, and owing the attaching creditors some ten thousand dollars for goods purchased on time for the fall trade, the bills not being due at the date of the sale to plaintiff.

Plaintiff says he had contemplated extending his business, so that the purchase was in line with a previously formed design. A few days after he opened the Chouteau Avenue store, he removed goods invoiced at \$1,463 to the Fourth Street store, and sold the remainder of the new purchase at auction; the goods thus sold realized something in excess of the price paid therefor. The change in the plaintiff's design to extend his business is accounted for on the ground of his ill-health.

When the trade was consummated, plaintiff called in his attorney, who prepared and Lederer signed and acknowledged a bill of sale. Inquiries were then made of Lederer as to his title to the goods, and of his wife whether she had any interest therein, but no inquiries were made as to the extent of the vendor's indebtedness. Plaintiff says he did not know that his vendor was indebted to the attaching creditors, or to any other person.

The Chouteau Avenue store was kept open while the parties were taking the invoice, and goods which arrived during that time were not included therein. There is some evidence to the effect that goods were shipped from the store during that time, and there is much evidence to a contrary effect. Lederer held a lease upon his store premises, and he and his son appear to have been designated as lessees. This lease was transferred to the plaintiff, who leased the second story of the building to Lederer, where the latter, his wife, and two sons continued to reside as before the sale to plaintiff. Some time previous to this sale, one of the sons of Lederer had worked for the plaintiff at his Fourth Street store. There are some other circumstances in evidence, which we deem it unnecessary to recite.

1. The point urged with so much confidence by the plaintiff, who is the appellant, that there is no evidence tending to show that Lederer intended to defraud his creditors, cannot be sustained. Lederer, it is true, had a right to prefer some creditors to others, and the fact that his sons were made the preferred creditors does not, of itself, furnish evidence of fraud; but the relationship is a fact to be considered with the other circumstances. Sons and sons-in-law figure at every turn of the evidence. The great effort on the part of the vendor seems to have been to get enough out of his property to pay off these favored persons, and there is some ground for making the deduction that the late purchases made by Lederer on time were made with a fixed purpose of never paying for the goods so purchased. In our opinion, there is evidence of an intended fraud on the part of Lederer.

2. Nor do we agree to the proposition that there is no evidence tending to show notice to plaintiff of the intended fraud. It may be inferred from the evidence that the price paid by the plaintiff for the goods was less than their real value. The transaction was one entirely out of the usual course of business of the vendor, and this the plaintiff well

knew. The plaintiff's agents were very cautious to make full inquiry as to whether the vendor had good title, and to that end interrogated his wife, but made no inquiry as to his indebtedness. On this subject there was a seeming studied silence. Direct and positive evidence of notice or knowledge by the vendee of the intended fraud is not required. Such notice or knowledge may be inferred from the circumstances. All the circumstances considered, there is evidence which justified the court in submitting the question of good faith on the part of the purchaser to the jury as a question of fact.

3. The court, at the request of the defendant, instructed the jury that if the transfer of the property from Lederer to plaintiff was made by Lederer with intent to hinder, delay, or defraud his creditors, and the plaintiff "had knowledge of facts and circumstances from which such fraudulent intent might reasonably and naturally be inferred by an ordinarily cautious person, then said transfer of said property to the plaintiff is fraudulent and void, and the jury should find for defendant."

The court gave other instructions of its own motion, which are to the following effect: That if the vendee had knowledge of facts and circumstances sufficient to put a man of ordinary prudence upon inquiry touching the vendor's intention, and failed to make such inquiry; that such inquiry, if made, would have disclosed an intent of the vendor to defraud his creditors,—then the sale was fraudulent on the part of the vendee, even though he paid a valuable consideration for the goods and had no actual knowledge of the intent of the vendor to defraud his creditors.

There is no question of constructive fraud in this case. The sale of the goods is attacked on the ground that it was made with intent to hinder, delay, or defraud the creditors of the vendor, and therefore within the second section of the statute concerning fraudulent conveyances. That statute does not apply to conveyances of property, real or personal, where the vendee is a *bona fide* purchaser for value. As the plaintiff paid a valuable consideration and took immediate possession, it devolved upon the defendant to show that plaintiff was not a *bona fide* purchaser. In other words, to defeat the sale, defendant must show that it was made by the vendor to hinder, delay, or defraud his creditors, and that the vendee in some way participated in the intended fraud. By the instructions given, the vendee's participation is placed on the

ground alone that he purchased with notice or knowledge of the fraudulent purposes of the vendor. These instructions do not, in terms, submit this question to the jury, but charge him with constructive notice or knowledge, if he knew of facts which would put a prudent person upon inquiry and lead to a discovery of the fraud. Such facts are made equivalent to notice or knowledge. Such is the law in many courts, as will be seen from the authorities cited by respondent. It is the favorite doctrine of some of the text-writers: Wait on Fraudulent Conveyances, 2d ed., sec. 379; Bump on Fraudulent Conveyances, 3d ed., 494.

This court, the respondent contends, has adopted the same rule; and in support of the claim we are cited to *Rupe v. Alkire*, 77 Mo. 641. In that case we said a refused instruction should have been given, which concluded with these words: "And if the jury believe from the evidence that sufficient knowledge was obtained by the plaintiff to put him upon his inquiry, then the jury have the right to infer that the plaintiff had knowledge of the fraudulent character of the transaction, if they further find it was in fact fraudulent." This instruction, which we said should have been given in that case, furnishes no precedent for the instruction given by the court in the case in hand. It is one thing to say knowledge may be inferred from facts and circumstances sufficient to put a person upon inquiry, and that is the effect of the refused instruction in that case; but it is a different thing to say such circumstances are, as a matter of law, knowledge. There is no element of constructive notice in the refused instruction in the *Rupe-Alkire* case. It is left to the jury to find the fact as to whether the purchaser had knowledge of the fraudulent character of the transaction, while in the case in hand the designated facts are declared to be notice or knowledge, and that, too, without any regard as to what the actual fact may have been. Indeed, this court, in substance, said, in *State v. Merritt*, 70 Mo. 275, that it was not the duty of every purchaser of goods to inquire into the motives of the vendor for making the sale; for such a rule would hamper the transfer of personal property to an extent which would be detrimental to commerce and subversive of the policy which encourages a free and untrammelled traffic in such property.

The very question now under consideration came before the court of appeals in *Parker v. Conner*, 93 N. Y. 118; 45 Am. Rep. 178. That was a suit to recover damages for an alleged un-

lawful seizure and sale of personal property which the plaintiff had purchased from Halloran. The question was, whether the sale to plaintiff was one made in fraud of creditors. The trial court instructed the jury that facts and circumstances sufficient to put a prudent person upon inquiry constituted notice of the fraud. The conclusion of the court of appeals is expressed in these words: "We think that in cases like the present, where an intent to defraud creditors is alleged, the question to be submitted to the jury should be, whether the vendee did in fact know or believe that the vendor intended to defraud his creditors, not whether he was negligent in failing to discover the fraudulent intent, and that, on general principles, independently of the statute, the same rules are applicable in such cases as are applied for the purpose of determining the *bona fides* of a holder of commercial paper." The same doctrine is asserted in *Coolidge v. Heneky*, 11 Or. 327; *Lyons v. Leahy*, 15 Or. 8; and in *Carroll v. Hayward*, 124 Mass. 120.

The court in *Knower v. Cadden Clothing Co.*, 57 Conn. 202, 221, when speaking upon the same question, said: "We have made these references to the decisions of this court for the purpose of showing that in all cases where the title of a vendee has been attacked because of the intent on the part of the vendor to defraud his creditors by the transfer, those making the attack have been required to assume the burden of proving that the vendee had actual knowledge of and participated in the fraud; that is, that he had an intent to commit a fraud; this to be proven as a fact, and not to be imputed by any rule of law." So in *Seavy v. Dearborn*, 19 N. H. 351, the court, speaking of the evidence and instruction as to the vendee's participation in an alleged fraudulent sale of goods, said: "The true issue presented is the question of actual knowledge. . . . The evidence required is that which shall convince a jury that the party did know the unlawful purpose. . . . The evidence required by the instructions given to the jury at the trial comes short of this. Instead of knowledge, they were required only to find such facts as would have led an observer of common intelligence to perceive and understand the motives of Hills; such facts being sufficient, according to the instructions, to have put the plaintiff upon inquiry, and to have charged him with knowledge. The effect of this language was to charge the plaintiff upon a mere constructive or implied knowledge of the fraud, and was therefore erroneous."

The equity rule which charges one with knowledge of fraud if he had knowledge of sufficient facts to put him upon inquiry and lead to a discovery of the fraud had the inquiry been pursued, is open to several objections when used as a guide or formula for instructing the jury in cases like the present one. It lays out of sight and disregards the actual fact. It measures the good faith of a confiding and unsuspecting vendee by the same standard that it does the shrewd and experienced trader. It makes the vendee a participant in the fraudulent purposes of the vendor by constructive knowledge, while an actual intended fraud on the part of the vendor must be shown. The doctrine of constructive notice has no just application to cases like the one in hand. Where the vendee has paid a valuable consideration, and it is sought to avoid the sale because he had notice or knowledge of a fraudulent intent on the part of the vendor, the question to be submitted to the jury is, whether he had notice or knowledge of the fraudulent purpose of the vendor, and not whether he had knowledge of facts which would put a prudent person upon inquiry, and lead to a discovery of a fraud. This notice or knowledge need not be shown by direct and positive evidence. It may be inferred from other facts and circumstances. Facts which would put a person upon inquiry will be evidence from which the inference may be drawn, but it should be left to the jury to make the inference. Such notice or knowledge may be proved like any other fact, and it is none the less actual notice or knowledge because inferred from the *res gestæ*.

Some other questions are made in the briefs, but it is not likely they will arise on a new trial, and they are therefore not considered. For the error in the instructions before pointed out, the judgment is reversed, and the cause remanded.

FRAUDULENT CONVEYANCES — FRAUDULENT KNOWLEDGE OF GRANTEE. — One who has purchased realty and paid therefor a valuable consideration in good faith, without notice of the fraudulent purpose of the grantor, acquires a good title as against the creditors of such grantor: *Carnahan v. McCord*, 116 Ind. 67; *Smith v. Selz*, 114 Ind. 229; *Des Moines Ins. Co. v. Lent*, 75 Iowa, 522; *Paul v. Baugh*, 85 Va. 955. But a conveyance for a valuable consideration may be avoided where the vendee bought without inquiry, having a knowledge of facts sufficient to put a man of ordinary prudence upon inquiry, acting upon which he might have discovered his vendor's fraudulent intent: *Dyer v. Taylor*, 50 Ark. 314; *Blum v. Simpson*, 71 Tex. 628; *Evans v. David*, 98 Mo. 405; *Nicholson v. Condon*, 71 Md. 621; *Biddinger v. Wiland*, 67 Md. 359; *Godfrey v. Miller*, 80 Cal. 421; see also *Weber v. Rothchild*, 15 Or. 385; 3 Am. St. Rep. 162; *Philbrick v. O'Connor*, 15 Or. 15; 3 Am. St. Rep. 139; *Hoyt v. Turner*, 84 Ala. 523. Actual knowledge on the part of a

grantee of his grantor's purpose to defraud his creditors, participated in by him, will always render the conveyance invalid as to the creditors: *Bush v. Roberts*, 111 N. Y. 278; *Lewis v. Linscott*, 37 Kan. 379; *Ruse v. Bromberg*, 88 Ala. 620. The mere fact that a valuable consideration passed does not, of itself, validate a deed made with a fraudulent purpose: *Nichols v. Nichols*, 61 Vt. 426.

The notorious insolvency of a grantor at the time he executes a deed to his son-in-law is evidence tending to show guilty participation on the part of the grantee in the fraud against the creditors: *Helms v. Green*, 105 N. C. 251; 18 Am. St. Rep. 893, and note; and to the same effect, substantially, is *Washburn v. Huntington*, 78 Cal. 573. The grantee's guilty knowledge of his grantor's intent to defraud his creditors may be proved by direct evidence, or inferred from circumstances, such as showing him to be in the possession of such knowledge as would awaken suspicion in an ordinarily sagacious person: *Lyons v. Leahy*, 15 Or. 8; 3 Am. St. Rep. 133. And, ordinarily, parties are presumed to intend what they know or ought to know would be the effect of their conveyances: *Nichols v. Nichols*, 61 Vt. 426. The grantee's knowledge of the grantor's fraud cannot, however, be proved by the declarations of the latter: *Bush v. Roberts*, 111 N. Y. 278; *Smith v. Jensen*, 13 Col. 213. Failure of a grantee to record his conveyance, disconnected with any other suspicious circumstance, is not proof of fraudulent intent: *National Bank v. Jaffray*, 41 Kan. 695.

While fraud is never presumed, yet if a transaction is shown to be tainted with fraud on the part of one of the actors, then it is not incumbent upon the party attacking the transaction to prove the fraud of the other party claiming rights thereunder; so that in cases of attack upon fraudulent conveyances, the evidence having shown a *prima facie* case of fraud on the grantor's part, the burden of proving himself innocent of fraud is cast upon the grantee: *Richards v. Vaccaro*, 67 Miss. 516; 19 Am. St. Rep. 322, and note; *Weber v. Rothchild*, 15 Or. 385; 3 Am. St. Rep. 162, and note; *Buckingham v. Tyler*, 74 Mich. 102. In *Smith v. Jensen*, 13 Col. 213, it is decided that where a defendant alleges fraud in the title of the plaintiff, he has cast upon him the burden of proving the allegation; for the fraudulent intent of the grantor alone is not sufficient to avoid a sale; the vendee must be a participant therein.

Fraud, as between a vendor and vendee, detrimental to the interests of the vendor's creditors, is ordinarily a question to be submitted to the jury: *Judson v. Lyford*, 84 Cal. 505; *Heaton v. Nelson*, 74 Mich. 199; *Helms v. Green*, 105 N. C. 251; 18 Am. St. Rep. 893.

MAUS v. CITY OF SPRINGFIELD.

[101 MISSOURI, 613.]

MUNICIPAL CORPORATIONS — NEGLIGENCE IN REPAIR OF STREETS. — If a city by its charter is charged with the duty to keep its streets in repair, and has ample means provided by taxation to discharge it, it is liable for neglect to perform such duty.

MUNICIPAL CORPORATIONS — PROOF OF STREET. — A certain locality within a city may be shown to be part of a public street by proof that it was in the actual possession of the city and opened to and used by the public as a thoroughfare. Formal dedication or appropriation of the street need not be shown.

MUNICIPAL CORPORATION IS BOUND TO EXERCISE ORDINARY CARE to keep its streets in repair for the use of the public by night as well as by day.

MUNICIPAL CORPORATIONS. — NOTICE OF DEFECT IN STREET on the part of a city may be inferred from a continuance thereof for three months; and a failure to repair such defect after notice, and a reasonable opportunity to do so, is evidence of negligence.

MUNICIPAL CORPORATIONS — DEFECT IN STREET — CONTRIBUTORY NEGLIGENCE. — Knowledge of a defect of long duration in a street, by a foot-traveler injured thereby, is not necessarily a bar to recovery, where the defect is not of such nature as to render the use of the street necessarily dangerous to a person ordinarily careful, nor can it be declared, as matter of law, that he failed to exercise ordinary care, where the facts do not exclude every other fair and reasonable inference. In such case the question of contributory negligence is for the jury.

APPEAL from a judgment of nonsuit in an action to recover for personal injuries by reason of the alleged negligence of the defendant city to keep its streets in proper repair after notice of defects. The alleged defect in the street consisted of a gap of twelve or fifteen inches in width and two feet deep, extending across the usual traveled footway at the point where plaintiff was injured one dark night while passing on an errand of business. The other facts are stated in the opinion.

George S. Rathburn, for the appellant.

Goode and Cravens, for the respondent.

BARCLAY, J. In the argument it is conceded that the defendant, being charged by its charter with the duty to keep its highways in repair, and having ample means provided by the taxing power to discharge it, would be liable for neglect to perform that duty, on a proper showing. But defendant claims (and the trial court held) that no such showing has been made.

To establish the character of the locality where the injury occurred as part of a public street, nothing more was essential

than to show that it was in actual possession of the city and open to and used by the public as a thoroughfare at the time. This plaintiff did. It was not necessary to prove any formal dedication or appropriation of the street.

That defendant was bound to exercise ordinary care to keep the place in question (as well as other portions of its traveled streets) in a condition of reasonable safety for the use of the public, by night as well as by day, is a proposition too clear to require discussion.

We consider the evidence offered by plaintiff (of which the substance is presented in the statement accompanying this opinion) as tending to establish a breach of that duty.

It appeared that there was a considerable gap in the traveled cross-walk, that the place was totally dark, and that plaintiff, in endeavoring to pass over it, slipped, fell, and was injured. It further was shown that the gap referred to had been in existence at least three months, and was readily noticeable.

Exactly what length of time would furnish evidence of notice to the municipal authorities of such a defect would be difficult to say. "Five to twenty days" was held sufficient in a recent decision: *City of Griffin v. Johnson*, 84 Ga. 279; and three months in another: *Tice v. Bay City*, 78 Mich. 209; and two months in another: *Market v. St. Louis*, 56 Mo. 189. The circumstances of each case must be considered with reference to the nature of the defect in question. In that now before us, we think the evidence was sufficient to fairly justify the inference that defendant had timely notice of the defect, and therefore tended to prove that fact.

Failure to repair a defect in a traveled public street, after notice and reasonable opportunity to do so, is evidence of negligence on the part of the city.

We are of opinion that there was a case made in this instance for the submission of that issue to the jury.

2. From the record and briefs of counsel, we infer that the trial court regarded plaintiff as chargeable with contributory negligence in the premises, and for that reason forced him to a nonsuit. In so doing, we think there was error.

It cannot properly be declared, as matter of law, that plaintiff failed to exercise ordinary care unless the facts in evidence exclude any other fair and reasonable inference on the subject. We do not think such is their effect here.

Plaintiff admits he was aware of the gap or opening in the

crossing, but the alleged defect in it was not of such nature as to render its use necessarily dangerous to a person ordinarily careful. His knowledge of it was entitled to consideration as bearing on the issue of his negligence, but it was not decisive of that issue, nor did it of itself preclude a recovery: *Lowell v. Watertown*, 58 Mich. 568; *Smith v. St. Joseph*, 45 Mo. 449.

That plaintiff stumbled and fell at the point of the alleged break in the cross-walk may be, perhaps, ascribable, as a matter of fact, to his carelessness; but in the circumstances of his position at the time, we think negligence cannot properly be asserted of his conduct as a conclusion of law.

The issue of his negligence in the premises should have been submitted to the jury for their finding.

We are all of opinion that the judgment should be reversed, and a new trial granted. It is so ordered.

MUNICIPAL CORPORATIONS — NEGLECT TO REPAIR STREETS. — When a city, by its charter, is charged with the duty of keeping its streets in a safe and convenient condition for travel, it is liable in damages to one who is injured by reason of its neglect to perform such duty: *Farquar v. City of Roseburg*, 18 Or. 271; 17 Am. St. Rep. 732, and note.

MUNICIPAL CORPORATIONS — NOTICE TO THE CITY OF DANGEROUS STREET. — A municipal corporation must be deemed to have notice of the dangerous condition of a street when it had been in such a condition for two months prior to an accident: *Pettengill v. City of Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442, and note.

WITTING v. ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY.

[101 MISSOURI, 631.]

PRACTICE. — APPEAL FROM JUSTICE'S JUDGMENT WAIVES ALL ERRORS and defects in the original summons and the service thereof.

PRACTICE. — COMPLAINT IN JUSTICE'S COURT which not only advises defendant of the nature of plaintiff's claim, but is of such nature that a judgment upon it will bar another action for the same demand, is sufficient.

COMMON CARRIER, CONTRACT EXEMPTING, FROM LIABILITY FOR NEGLIGENCE. — A common carrier may, by special contract, limit his common-law liability as insurer of goods intrusted to him for transportation against loss or damage. He cannot so free himself from liability for loss or damage occasioned by his negligence, or that of his servants.

COMMON CARRIER — NEGLIGENCE — BURDEN OF PROOF. — Where a cause of action against a common carrier is for his negligence, and not on his common-law liability as an insurer, the burden of proof is upon the plaintiff from the beginning to the end of the case.

COMMON CARRIER — NEGLIGENCE — BURDEN OF PROOF. — Where the bill of lading exempts the carrier from liability for breakage, he must, in an action for damage, in the first instance, bring himself within the exemption; the burden of proof is then upon plaintiff to prove the carrier's negligence.

E. D. Kenna and Adiel Sherwood, for the appellant.

Davis and Davis, for the respondent.

BLACK, J. This suit was commenced before a justice of the peace by filing the following account: "St. Louis and San Francisco Railway Company, to Theo. J. Witting (formerly Reichenbach), Dr. To damages in negligently breaking soda apparatus shipped May 2, 1884, from Oswego, Kansas, to St. Louis, Missouri, two hundred dollars."

The justice gave judgment by default, and thereafter the defendant appealed to the circuit court, where, upon a trial anew, the plaintiff again recovered judgment, and the defendant appealed to the St. Louis court of appeals. That court reversed the judgment, and remanded the cause for error in the instructions. The cause was then certified to this court, because one of the judges deemed the decision in conflict with prior decisions of this court.

1. In the circuit court the defendant moved to dismiss the cause, because the justice had no jurisdiction over the person of the defendant, and hence the circuit court had no jurisdiction. The only specific reason assigned in the motion is, that a copy of the complaint filed before the justice was not served on the defendant. It does not appear by the constable's return that he served the defendant with a copy of the complaint, as seems to be provided for by section 2865 of Revised Statutes, 1879, as amended by the act of March, 1883: Acts of 1883, p. 104. The defendant, however, by suing out an appeal, waived all errors and defects in the original summons, and in the service thereof, and for this reason the motion to dismiss was properly overruled: *Fitterling v. Missouri Pac. R'y Co.*, 79 Mo. 504.

2. The defendant objected to the introduction of any evidence, because the statement filed with the justice disclosed no cause of action. The statement not only advised the defendant of the nature of the plaintiff's claim, but a judgment upon it would bar another action for the same demand, and the statement is therefore all that the law requires: *Butts v. Phelps*, 79 Mo. 302.

3. On the trial in the circuit court, the plaintiff produced

evidence showing that he acquired the soda-fountain, which was made of Italian marble, from one Kingsbury, at Oswego, in the state of Kansas; that the apparatus was packed in a crate, and when so packed, was received by the defendant's agent at the last-named place for shipment to St. Louis. When plaintiff received it from defendant, one side of the crate was broken. The fountain had been placed in the center of the crate, with inside braces on each side and on the top to keep it in place. Of these inside braces, one was broken, and the others out of place. The pieces of marble forming the fountain were all broken, except one side-piece. With this evidence the plaintiff closed his case.

The evidence produced by defendant tends to show that the apparatus, when received at Oswego, was packed on the inside of a crate; that the outside packing appeared to be secure, but the inside packing could not be seen; that the crate was placed in a car with care, with no other freight near it. The trainmen say the car received no rough or unusual handling; that there was no unusual jarring or jolting, and that the car came through without accident. The car was not opened while in transit. The loading-clerk at St. Louis says: "Found the crate standing upright near the car door, in good shape; the boards were not broken. Could see inside the crate through the slats; marble was cracked on two sides; myself and men put it down carefully on the warehouse floor; the crate had the appearance of being second-hand, and did not fit the fountain; it was too large; the crate itself was in good order, and not broken."

Kingsbury, the consignor, says the apparatus was fastened together with screws; the screw-holes were drilled in the marble, and the holes filled with lead or other metal, and threads for the screws cut in the metal; the screws went through the outside slabs into the ends of the inside slabs; the fountain was old, and the screw-holes worn. "I frequently plugged the holes with wood, so that the screws would not slip out; do not remember whether or not I plugged the screw-holes just before I shipped the apparatus."

Defendant put in evidence the bill of lading, which recites the receipt of the property "in apparent good order," and contains, among others, this condition: "Marbles at owner's risk of breakage."

At the request of the plaintiff, the court instructed the jury that if they believed the apparatus, when delivered to defend-

ant, "was in good order, that is to say, not broken, and it was properly packed for such shipment, and that the same was delivered in St. Louis in an injured and broken condition, then the law presumes that such damage and injury was occasioned through the fault of the defendant; provided, also, the jury believe and find that, by the exercise of ordinary care on the part of defendant's employees handling its trains, and handling the said soda apparatus, the same could be carried and delivered to the consignee in the same condition it was in when defendant received it."

And the court, of its own motion, gave this instruction: "The court instructs the jury that the plaintiff is not entitled to recover unless he has shown, by a preponderance of the evidence, direct and circumstantial, that the injury complained of was occasioned by the negligence of the defendant, its servants, agents, or employees, and the court further instructs you that the burden of proving negligence rests upon the plaintiff."

It must be taken now as the settled law that a common carrier may, by a special contract, limit his common-law liability as insurer of property intrusted to him for transportation against loss or damage. It is equally well settled that he cannot limit his liability so as to free himself from loss or damage occasioned by his negligence or that of his servants. When this case went to the jury it stood as a conceded and undisputed fact that the goods were shipped under the special contract which exempted defendant from liability for breakage; so that the issue of fact was, whether the soda apparatus was broken by reason of negligence on the part of the defendant or its servants. The instruction given by the court of its own motion places the burden of proof of this issue on the plaintiff. The instruction given for the plaintiff places the burden of proof upon the defendant, after the jury have reached the conclusion that the soda apparatus was properly packed and delivered to the plaintiff in good condition, and was delivered to the consignee in a broken condition. The objection that these instructions are inconsistent need not be considered. The real question presented is, Upon whom did the burden of proof on the issue of negligence rest when this case went to the jury?

Upon this question the authorities are in direct conflict. On the one hand it is held that when the common carrier relies upon a contract exemption, he must bring himself within

the exemption, and that he does not do this by simply showing that the goods were lost, or destroyed, or injured by the excepted peril or accident, but that he must go further, and show that he was free from any negligence contributing to the loss or injury. The following are some of the cases which support this doctrine: *Brown v. Adams Express Co.*, 15 W. Va. 812; *Berry v. Cooper*, 28 Ga. 543; *Chicago etc. R. R. Co. v. Moss*, 60 Miss. 1003; 45 Am. Rep. 428; *Graham v. Davis & Co.*, 4 Ohio St. 362; 62 Am. Dec. 285; *Union Express Co. v. Graham*, 26 Ohio St. 595. The same doctrine was asserted by this court in *Levering v. Union Trans. & Ins. Co.*, 42 Mo. 89; 97 Am. Dec. 320, and in the subsequent case of *Ketchum v. American etc. Express Co.*, 52 Mo. 390. The question arose in the first of these cases on a bill of lading for the shipment of cotton containing the words "at owner's risk of fire." Judge Wagner, speaking for the court, said it devolved upon the defendant to show, notwithstanding the exception from liability stated in the contract, that the accident did not occur through any fault, want of care, or negligence on the part of defendant or its agent.

By the other line of authorities it is held to be sufficient for the carrier to show that the loss or damage was occasioned by some accident or peril, from liability for which he is exempted, either by his contract or by law; and that he is not required to go further, and show, in addition, that he was free from negligence contributing to the loss or damage. The following are some of the cases which assert this doctrine: *Lamb v. Camden etc. R. R. & T. Co.*, 46 N. Y. 271; 7 Am. Rep. 327; *Whitworth v. Erie R'y Co.*, 87 N. Y. 413; *Farnham v. Camden etc. R. R. Co.*, 55 Pa. St. 53; *Patterson v. Clyde*, 67 Pa. St. 500; *Little Rock etc. R'y Co. v. Talbot*, 39 Ark. 526; *Memphis etc. R. R. Co. v. Reeves*, 10 Wall. 176; *Read v. St. Louis etc. R. R. Co.*, 60 Mo. 199; *Davis v. Wabash etc. R'y Co.*, 89 Mo. 340. Observations made in *Wolf v. American Express Co.*, 43 Mo. 422, 97 Am. Dec. 406, are in line with the cases just cited, but the question of the burden of proof did not fairly arise in that case. It did, however, arise in the case of *Read v. St. Louis etc. R. R. Co.*, 60 Mo. 199. In that case the potatoes were shipped at owner's risk of freezing.

On the subject of the burden of proof, this court, speaking by Wagner, J., said: "Where the loss occurs from any of the causes excepted in the undertaking, the exception must be the proximate cause of the loss, and the sole cause. And where

the loss is attributable to such cause, still, if the negligence of the carrier mingles with it as an active and co-operating cause, he is responsible. When the loss of the goods is established, the burden of proof devolves upon the carrier to show that it was occasioned by some act which is recognized as an exemption. This shown, it is *prima facie* an exoneration, and he is not required to go further, and prove affirmatively that he was guilty of no negligence. The proof of such negligence, if negligence is asserted to exist, rests on the other party."

This quotation has been made for the purpose of showing that the court then abandoned the rule concerning the burden of proof laid down in the prior cases of *Levering v. Union Trans. and Ins. Co.*, 42 Mo. 89, 97 Am. Dec. 320, and *Ketchum v. American Exp. Co.*, 52 Mo. 390. There can be no doubt but the earlier cases were overruled on the point we are considering. They cannot stand as law in the face of the quotation we have made. Seventeen years later the principle of law asserted in *Read v. St. Louis etc. R. R. Co.*, 60 Mo. 199, was applied in *Davis v. Wabash etc. R'y Co.*, 89 Mo. 340.

It must therefore be taken as the established law of this state that when the cause of action stands on the ground of negligence on the part of the carrier, the burden of proof is upon the plaintiff. The authorities cited are not all agreed as to the ground upon which the rule stands. The true reason, it seems to us, is, that negligence is a positive wrong, and will not be presumed, though it may be inferred from circumstances. When the carrier brings himself within the exception, he need go no further to relieve himself from his liability as insurer. The party who founds his cause of action upon negligence must be prepared to establish the assertion by proof. If the cause of action stands on negligence of the carrier, and not on the common-law liability of the carrier as an insurer, the burden of proof is upon the plaintiff from the beginning to the end of the case. We do not see that there is anything so unreasonable in the rule as some courts seem to think, when it is remembered that, by the common law, the common carrier is regarded as an insurer of the safety of the goods against all losses except such as are caused by the act of God or the public enemy. He may contract against this liability as an insurer, but he cannot contract against his negligence or that of his servants. Though the goods may be carried under a special contract relieving him from the liability

of an insurer, still he is none the less a common carrier; and the question of negligence is to be determined in the light of the fact that he is a common carrier, and of the duties which he has assumed to perform. He is bound to use due care in the transportation of goods, regardless of any common-law liability as an insurer: *New York Cent. R. R. Co. v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 177.

It follows from what we have said that the court erred in the instruction given at the request of the plaintiff; for the cause of action standing, as it did, upon negligence when it went to the jury, the burden of proof was upon the plaintiff. That is to say, it devolved upon the plaintiff to satisfy the minds of the jurors from the evidence, taken as a whole, that the negligence of defendant caused the damage complained of, or was an active co-operating cause in producing the damage.

4. It is further insisted that the court erred in refusing to give defendant's instruction, at the close of all the evidence, in the nature of a demurrer thereto. This raises the question whether there was evidence tending to show negligence on the part of the defendant or its servants. If there was, then the demurrer was properly overruled.

There is evidence tending to show that the fountain was properly packed, and was delivered to the defendant in good order. It was badly broken when placed in the defendant's warehouse at St. Louis. The evidence of plaintiff and his brother is, that the crate was then broken on one side, and that one of the inside stays was broken and the others out of place. All this tends to show want of care on the part of defendant. Had the plaintiff brought this suit in the circuit court by declaring on the contract, setting out its provisions, and founding his case on negligence only, we think the evidence would have entitled him to go to the jury. It will not do to say the evidence shows no more than the simple fact that the apparatus was broken. The very circumstances which disclose this fact tend to show very great negligence on the part of the defendant. It is enough for the plaintiff to disclose circumstances sufficient to raise a fair inference of negligence. We can say with safety that such a breakage does not ordinarily occur where the property is transported with due care. There is an abundance of evidence to entitle the plaintiff to go to the jury on the issue of negligence, and

especially is this so, since the means of showing how the accident occurred is with the defendant, and not the plaintiff.

The judgment of the St. Louis court of appeals is affirmed.

CARRIERS — LIMITING LIABILITY BY CONTRACT. — A carrier cannot limit its liability by contract, so as to evade responsibility for injuries which may occur through its own negligence: *Alabama etc. R. R. Co. v. Thomas*, 89 Ala. 294; 18 Am. St. Rep. 119, and note; *Missouri P. R'y Co. v. Icy*, 71 Tex. 409; 10 Am. St. Rep. 758, and note; although it may limit by contract its common-law liability: *McFadden v. Missouri P. R'y Co.*, 92 Mo. 343; 1 Am. St. Rep. 721; *Pennsylvania etc. R. R. Co. v. Raiordon*, 119 Pa. St. 577; 4 Am. St. Rep. 670.

CARRIERS — NEGLIGENCE — BURDEN OF PROOF. — While the general rule is, that the burden of proving negligence is upon him who alleges it: *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416, 9 Am. St. Rep. 630, and note 637, 638; in actions against carriers, the burden is ordinarily upon the carrier to show itself free from negligence: *Merchants' D. T. Co. v. Bloch Bros.*, 88 Tenn. 392; 6 Am. St. Rep. 847, and note; *Mobile etc. R. R. Co. v. Tupelo F. M. Co.*, 67 Miss. 35; 19 Am. St. Rep. 262, and note. The burden of proof is upon the carrier to show a contract limiting its common-law liability, and that the loss comes within the exceptions made by it: *Hull v. Chicago etc. R'y Co.*, 41 Minn. 510; 16 Am. St. Rep. 722, and note in which are distinguished the cases of *St. Louis etc. R'y Co. v. Weakly*, 50 Ark. 397; 7 Am. St. Rep. 104; and *Platt v. Richmond etc. R. R. Co.*, 103 N. Y. 358. In *Railway Co. v. Manchester Mills*, 88 Tenn. 653, in a suit against a railway company for the loss of goods shipped under a contract exempting it from loss by fire not due to its own negligence, it was decided that the burden of proof was upon the plaintiff to show affirmatively that the loss by a fire had resulted through the negligence of the company; that the mere fact that the goods were lost by fire raised no presumption of negligence against the carrier.

HAYDEN v. BURKEMPER.

[101 MISSOURI, 644.]

DEED OF TRUST — GROWING CROPS. — The sale of land under a deed of trust carries with it the growing crops sown by the mortgagor.

R. H. Norton and T. F. McDearmon, for the plaintiff in error.

Theodore Bruère, for the defendant in error.

BLACK, J. J. R. Hayden brought this action of replevin against Christian Burkemper to recover eighteen hundred shocks of wheat, alleged to be of the value of eight hundred dollars.

There is no dispute as to the facts. Plaintiff sold 240 acres of land to one Cambron on the 10th of September, 1882. Cambron, at the same time, gave plaintiff a deed of trust on the land to secure seven notes, one for \$5,500, due in five

years, one for \$2,000, due in three years, and five for \$395 each, being annual interest notes. On the 10th of September, 1884, Cambron sold the land to defendant, who assumed payment of the notes as part of the purchase price. Defendant paid plaintiff \$708 on the 5th of January, 1886, to be applied on the two interest notes first maturing, but he made no other payments. Plaintiff assigned the two thousand dollars to Mrs. Stahlschmidt, and transferred the five-thousand-five-hundred-dollar note to Dyer as collateral security. Plaintiff frequently urged defendant to pay the notes which were due, and defendant as often promised to do so, but never fulfilled his promises. Matters stood in this shape on the 4th of June, 1887, when the land was sold under the deed of trust, and Dyer became the purchaser.

Defendant took possession of the land at the date of his purchase, and at the time of the trustee's sale had sixty-five acres in wheat, which was nearly ripe. Dyer sold the growing crop of wheat to plaintiff, and gave him a bill of sale therefor. Plaintiff and defendant both claimed the wheat after the trustee's sale, but defendant, being in possession, cut it, and hence this suit.

On the foregoing facts the circuit court gave judgment for the plaintiff, which was affirmed by the St. Louis court of appeals. The case was then certified to this court because one of the judges deemed the opinion in conflict with prior decisions of this court.

The case presented by this record falls within plain and very well settled principles of law. The deed of trust was in effect a mortgage. The defendant, having purchased the land subject to the deed of trust thereon, stood in the position of a mortgagor in possession. The case, then, is simply this: The mortgage was foreclosed by a sale thereunder while the mortgagor was in possession and the owner of the growing wheat sown and owned by him; and the question is, To whom does the wheat belong? It was held by this court years ago that a conveyance of land carried the crop of wheat growing upon it, owned by the vendor. Growing wheat, it was held, is a part of the freehold, and passes along with the land on which it is sown: *McIlvaine v. Harris*, 20 Mo. 458; 64 Am. Dec. 196. As between an executor and a devisee, a devise of land carries with it crops growing upon the land owned by the testator: *Pratte v. Coffman's Ex'r*, 27 Mo. 425. These cases are cited with approval in *Steele v. Farber*, 37 Mo. 72. So, too, the pur-

chaser of mortgaged premises at a foreclosure sale is entitled to the crops which were sown by the mortgagor and were growing upon the land at the date of the sale: 2 Jones on Mortgages, sec. 1658. And this for the reason that under such circumstances growing crops are accessories to the land. The rule of law that annual crops are treated as personal property for the purposes of a sale of them separate from the land does not affect this case. The purchaser at the trustee's sale became the owner of the growing wheat as against the mortgagor, and he had the right to, and did, sell it to the plaintiff. On the undisputed facts, the judgment of the trial court is right, so that it is unnecessary to speak of the instructions.

We may now notice the cases which it is claimed lead to a different result. *Harris v. Turner*, 46 Mo. 438, was an action of forcible entry and detainer. It was held that where A had entered upon the land of B and planted a crop, and was in the peaceable possession of the same, no superior right of B would justify him in ousting A by force. *Morgner v. Biggs*, 46 Mo. 66, holds that one person may have the ownership of growing crops separate from the ownership of the land by reason of a license to sow or plant the crop. In *Jenkins v. McCoy*, 50 Mo. 348, the plaintiff purchased land from Fisher, on which the defendant had planted and cultivated a crop of corn which he gathered and removed after the land had been conveyed to the plaintiff. It was held that notwithstanding the defendant planted and cultivated the corn without the consent of Fisher, and was a trespasser, still he was not liable to either the plaintiff or Fisher for the value of the corn; but it is there said if Fisher had planted and cultivated the corn it would have passed to plaintiff by the deed. *Adams v. Leip*, 71 Mo. 597, is quite like the cases just mentioned. *Garth v. Caldwell*, 72 Mo. 622, was an action of replevin to recover cord-wood, corn in shock, "and six acres of corn on the stalk." The petition, it was held, stated a cause of action, even as to the corn on the stalk. These cases show that there can be, and often is, an ownership of the growing crops in one person, while the ownership of the land is in another. These cases are wholly unlike the one in hand, and we do not see that they assert any principle inconsistent with the conclusion before stated.

The judgment is affirmed.

GROWING CROPS—FORECLOSURE OF MORTGAGE.—The purchaser at a foreclosure sale under a mortgage is entitled to the crops growing on the land at the time of the foreclosure sale: Note to *Crews v. Pendleton*, 19 Am. Dec. 753.

HARBER v. EVANS.

[101 MISSOURI, 661.]

PARTY-WALL — DEFINITION. — “Party-wall” ordinarily means a dividing wall between two houses, to be used equally for all the purposes of an exterior wall by both parties, without any exclusive use by either.

PARTY-WALL — INJUNCTION TO PREVENT EXCLUSIVE USE. — One who erects a party-wall under contract that either party may build it between their adjoining premises, one half thereof resting on each lot, the other party having the right to join to the wall, when erected, upon payment of one half of the value thereof, may be enjoined from placing windows and other openings in such wall, regardless of whether the other party intends to use the wall or not.

T. A. Witten and George Hall, for the appellant.

Stephen Peery and E. M. Harber, for the respondent.

SHERWOOD, J. The object of this proceeding was to prevent the defendant, then engaged in building a party-wall, from placing therein, in the second and third stories thereof, windows and other openings, in violation of an agreement theretofore entered into between the parties litigant, as follows: “This agreement, made and entered into this the twenty-sixth day of June, A. D. 1886, by and between Edgar M. Harber and Lizzie D. Harber, his wife, of Grundy County, Missouri, parties of the first part, and Edward Evans and Nettie Evans, his wife, of Grundy County, Missouri, parties of the second part, witnesseth: That whereas the said Edgar M. Harber, of the parties of the first part, and Edward Evans, party of the second part, are owners of adjacent lots and parcels of ground in lot sixteen (16), in the town of Trenton, in Grundy County, Missouri, and for the purpose of building a party or middle wall between the lots or parcels of ground so owned by the last-named parties, they agree with each other that the said Edward Evans, his heirs, executors, or assigns, build the southwest wall of the building he now proposes to build, and has in process of erection, so that the center of said wall shall be on the line that divides their said lots; that is to say, that each party shall furnish one half the ground covered by said wall, and when so built, said wall shall in all respects be a party-wall between said lots and said parties. Or in case said Edward Evans, his heirs, administrators, executors, or assigns, should not complete the building he now has in process of erection in a reasonable time, then all the rights herein granted to him shall also attach to the said Edgar M. Harber, his

heirs, executors, administrators, or assigns, to commence the erection of and build a wall as above specified, and the rights and privileges to commence and build said wall shall attach alike to both parties hereto; and it is further agreed that whenever either party shall erect a wall as heretofore specified, the other party, or his heirs, executors, administrators, or assigns, shall have the right to join onto said wall by payment to the opposite party of one half the value of said wall at the time of so joining to same, or one half the value of such portion of said wall as he shall attach to. In witness," etc.

The answer admitted the building of the wall with openings as alleged, but contended that this was no violation of the agreement thereby. The temporary injunction granted at the outset of the litigation was, on the final hearing, made perpetual.

Undefined by statutory regulations or by the agreement of the contracting parties, What is the meaning of the words "party-wall"? is one of the salient questions and the chief bone of contention in this cause.

An eminent author says: "By party-walls are understood walls between two estates, which are used for the common benefit of both": 2 Washburn on Real Property, 5th ed., 385. While this definition is sufficiently accurate and comprehensive for ordinary purposes, it scarcely meets the requirements of the case at bar.

Indeed, it has been said that the term "party-wall," and the rights which the owner or grantee acquires by mere force of the employment of that term in a grant or covenant, have never been judicially defined; but it was also said in the same case that a "party-wall," when used in such an instrument and in its general ordinary signification, means a dividing wall between two houses, to be used equally, for all the purposes of an exterior wall, by both parties, that is, by the respective owners of both houses: *Fettretch v. Leamy*, 9 Bosw. 510. These utterances, though but those of a single judge, appear to have met the approval of the learned author already cited: Washburn on Easements, 3d ed., 567.

The central idea, the true, comprehensive, and undivided meaning, of the term "party-wall," where used in an instrument such as the one under consideration, would seem to be that of mutuality of benefit, and that idea is at war with any exclusive use of such wall by either proprietor. The effect of such contracts is to create in each owner of such wall recip-

rocal easements in the wall when built: *Sharp v. Cheatham*, 88 Mo. 498; 57 Am. Rep. 433, and cases cited. In short, the idea of reciprocity pervades the whole contract, and effectually excludes the idea of any exclusive use of the wall.

If this view is the correct one, then it follows that under a proper construction of the contract between the parties, that the defendant improperly attempted to thwart the purposes of that contract by the manner in which he was building the common or party wall, leaving openings therein for his own exclusive use.

This view meets with support in the following cases. In *Sullivan v. Graffort*, 35 Iowa, 531, an injunction was granted to prevent the defendant from making openings in a common or party wall built and paid for by him, between two houses, and it was adjudged that plaintiff was entitled to the relief prayed; that defendant, while entitled to the use of the wall, could not subject it to any additional burden than that of using it as a wall in common; that any other use, to wit, making openings therein, subjected it to a servitude foreign to such use, and the objects and purposes of the statute, and that such limitation of the use was equally assertive whether before or after the wall became one in common by payment by each party of his proportionate share of the cost of erection. The force and effect of this authority is not at all diminished by the fact that rulings made were based upon statutory provisions; for those provisions were substantially identical with those of the contract before us.

In the case of *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627, a similar ruling was made. In that case the original agreement was for building a "party-wall," Devine to build it, Dauenhauer to give half the ground on which the wall was to rest, and to pay half of the cost of the wall. Under this agreement, Devine built a two-story building, Dauenhauer having at that time a one-story building on his lot. Subsequently, Dauenhauer began the erection of a three-story building on his lot, and being about to raise the party-wall for that purpose, was induced by Devine to sign an agreement that such wall should be a "dead wall." As the work went on, however, Dauenhauer, either mistaking or else ignoring the second contract, constructed the wall of the third story, not as a "dead wall," but one with divers openings in it, and upon this it was ruled that the second agreement, having no consideration to support it, was therefore void, but that the

original agreement, being for "a party-wall, or a dividing wall, between their houses, obviously did not contemplate windows or doors."

And so the injunction prayed for was made perpetual. That injunction is the proper remedy in instances like the present is shown already by the cases cited.

But the trespass in this case was of a continuing nature, whose constant recurrence rendered the remedy at law inadequate, by reason of the fact that each disturbance of plaintiff's easement in the wall would have formed the basis of a fresh suit (*Blunt v. McCormick*, 3 Denio, 283), to avoid the necessity of which equity will interpose by injunction: 1 High on Injunctions, 3d ed., sec. 697. Besides, the trespass or the disturbance of plaintiff's easement in the party-wall would, if permitted to continue, ripen into an easement, and this itself is ground, also, for equitable relief: 1 High on Injunctions, 3d ed., sec. 702.

But citation is made of the case of *Pierce v. Lemon*, 2 Houst. 519, as being opposed to the ruling made by the court below; but this is altogether a misapprehension. There the plaintiff and the defendant were the owners of adjoining lots in the city of Wilmington, and the latter built a party or division wall of a brick stable with three windows therein, commanding a view of plaintiff's back yard, etc., and it was held that an action on the case could not be maintained; that the only remedy plaintiff had was to build blinds or other erections in front of the obnoxious openings, and thus cut off the defendant's view: 3 Kent's Com., 13th ed., 448; 1 Saunders's Pleading and Evidence, 117; *Moore v. Rawson*, 3 Barn. & C. 340.

But, obviously, this familiar doctrine has nothing whatever to do with the case at bar. There is a world-wide difference between making windows or doors in a wall overlooking a man's garden, and making similar openings whereby access could be had to the private rooms in a man's dwelling-house. To state such a case is sufficient to show its entire inapplicability in a cause like this.

Another objection raised to the validity of the ruling below is, that the petition does not allege that the plaintiff ever intends to use the party-wall. This is true; but there are several answers to that objection. Whether plaintiff intended to use the wall or not is quite immaterial, since, under the contract, he had acquired a valuable right which was the subject of sale

and transfer, which right was worthy of protection, and should be protected by a court of equity.

The evidence in this cause is not preserved in the record, but if evidence of that sort was necessary to plaintiff's case, and had been introduced, this would have authorized the trial court, the variance not being material, to have found the facts, according to the evidence, without any amendment (R. S., 1889, sec. 2097); and the evidence not being preserved, it will be presumed that the action of the lower court was correct in this particular, and justified by the unpreserved evidence. But aside from this view, if, as heretofore considered, defendant had repudiated the terms of his contract, he thereby forfeited plaintiff's consent given by that contract that he might build one half of the wall on plaintiff's land, and became in consequence thereof a trespasser *ab initio*, engaged in building a permanent structure on plaintiff's land without his consent. This, of itself, would furnish ground for the relief sought.

The judgment should be affirmed.

PARTY-WALLS. — As to the definition of and the general nature of a party-wall, see *Bloch v. Isham*, 92 Am. Dec. 289-306.

PARTY-WALLS — INJUNCTION. — One part owner of a party-wall may be enjoined, at the suit of the other, from making windows or other openings in the wall: *Graves v. Smith*, 87 Ala. 450; 13 Am. St. Rep. 60; note to *Bloch v. Isham*, 92 Am. Dec. 297.

WARD v. FAGIN.

[101 MISSOURI, 669.]

LANDLORD AND TENANT — REPAIR OF PREMISES. — A landlord is not bound to keep the leased premises in repair, nor is he responsible to the tenant for injuries resulting to the latter from the non-repair of the leased premises. He is liable only for acts of misfeasance, and not of non-feasance.

LANDLORD AND TENANT — REPAIR OF PREMISES — IMPUTATION OF NEGLIGENCE TO LANDLORD. — In the absence of express covenant, the landlord is not bound to keep the leased premises in repair, nor can the negligence of a third party in this respect be imputed to him, whether the lessee is tenant of the whole or only a portion of the leased premises.

LANDLORD AND TENANT — LANDLORD'S LIABILITY FOR NEGLIGENCE OF THIRD PERSON. — Where the landlord is not bound to keep the leased premises in repair, any injury to them, and through them to the tenant, caused by the negligent act of third persons, cannot create or cast on the landlord a liability which, prior to such act, did not exist.

Rochester Ford, for the appellant.

J. L. Hornsby and J. W. Riddle, for the respondents.

SHERWOOD, J. This cause arose in a justice's court, was appealed to the circuit court, and from there to the St. Louis court of appeals, and from thence transferred to this court under the provisions of the constitutional amendment of 1884.

It is a suit by a subtenant to recover from a lessee (his lessor) of certain property damages for injury to said subtenant's stock of goods situated in the room rented. The terms of the first lease are not alleged nor disclosed, but it appears from the evidence that there was a lot of ground on which the Odd Fellows Association was having an excavation made; that between said lot and plaintiffs' premises was an alley, seven and one half feet wide; that defendant had enjoined said Odd Fellows Association from interfering with said alley; and that the injury to plaintiffs' goods arose from said excavation being extended two and one half feet into said alley, and striking an unknown sewer.

The only allegation of negligence is, that the defendant knowingly and willfully permitted plaintiffs to remain in said premises while the same were in an unsafe condition; and the evidence shows that plaintiffs, when the accident happened, knew that said excavation was being made.

The evidence for the plaintiffs was substantially as follows: Gus A. Ward, one of the plaintiffs, testified that plaintiffs were partners in the cigar and liquor business, and rented a room in the building 812 Olive Street, of defendant, for \$12 per month; that on June 12, 1886, the west wall of said building fell down, and caused the furniture and stock in plaintiffs' room to be damaged in the sum of \$250; that he supposed the wall fell because of the excavation being made by the Odd Fellows Hall Association; that he did not know the building was unsafe, but knew an excavation was being made for the Odd Fellows Association.

Richard Brown testified that he was the contractor who made the excavation for the Odd Fellows Hall Association, and that there was an alley seven and a half feet wide between defendant's building and the property of the association; that defendant spoke to him of some notice which he had received regarding the excavation, and told him that he had put Mr. Clark, defendant's son-in-law, in charge of the

property; that there was quite a bank of earth on defendant's side of the alley; that Mr. Clark tried to engage witness to remove said earth, but defendant had enjoined witness from interfering with said alley; that the wall which fell was built separate and apart from the main building, with a stairway between, and was built over a sewer, and when witness dug below said sewer the water seeped out and caused the wall to fall; that witness put the footings for the building of the association two feet and seven inches in the alley. The witness also testified that he and his son made the excavation for the association, and that if the excavation had not been made, the wall would not have fallen.

There was also other testimony from another witness, of a similar import, as to the cause of the fall of the wall. It was shown, also, that the defendant's agents had received notice, in March, 1886, from the Odd Fellows Hall Association, that they would immediately proceed to excavate their ground situate just across the alley from the property leased by defendant.

Among other instructions, the court gave this one on behalf of the plaintiffs: "If you find from the evidence that on June 12, 1886, plaintiffs were tenants of defendants, and as such in possession of a room in the building 812 Olive Street, using the same as a sample or store room, and that defendant, after having been notified of the intended excavation near said building before said date, failed and omitted to shore up or protect said building, and that because of such omission the said building fell, and that it would not have fallen had defendant exercised ordinary care to protect same after said notice and before said fall, and that the goods and property of plaintiffs were damaged by said fall of said building, then your verdict should be for the plaintiffs, on their cause of action."

The defendant asked, but the court refused to give, an instruction in the nature of a demurrer to the evidence. The jury returned a verdict giving damages to the plaintiffs, and judgment going on the verdict, the defendant appealed.

The controlling question in this cause is the right of the plaintiffs to maintain this action. On the facts stated, have they such a right?

Aside from an express covenant to that effect, a landlord is not bound to keep the leased premises in repair, nor is he responsible in damages to his tenant for injuries resulting to the

latter from the non-repair of the leased premises. In the absence of contractual obligation, the landlord, as regards his tenant, is only liable for acts of misfeasance, but not of non-feasance. This statement of the law is abundantly supported by the authorities, and in this state from an early period the familiar rule has been followed: *Morse v. Maddox*, 17 Mo. 573, and cases cited. The same principle is announced in the later case of *Peterson v. Smart*, 70 Mo. 38.

Of course, if the landlord is not bound to repair unless upon covenant so to do, it must logically follow that any injuries arising from a failure on his part to repair can give no cause of action to the tenant, whether resulting to the tenant's goods or to his person.

If the landlord owes no duty to his tenant in this regard, then certainly negligence cannot be imputed to him; for negligence can only spring from unperformed duty: *Cooley on Torts*, 2d ed., 791; *Hallihan v. Hannibal etc. R. R. Co.*, 71 Mo. 113. And if it be conceded, as it must, from the authorities, that the landlord is not bound to keep the leased premises in repair, the same principle will apply whether the tenant be lessee of the whole premises or of only a portion thereof; for what is true of the integer of non-liability must be equally true of each of its component fractions.

From the same premise, to wit, that a landlord is not bound to repair, it must follow as a necessary deduction that any injury to the leased premises, and through them to the tenant, caused by the negligent acts of third persons, cannot create or cast on the landlord a liability which, prior to such negligent act, had no existence. That a landlord is not responsible in cases of this sort to rebuild or repair where a tenant was but the lessee of a portion of the tenement-house, and such house was damaged by fire, and thus loss occasioned to the tenant's goods, has been directly adjudicated: *Doupe v. Genin*, 45 N. Y. 119; 6 Am. Rep. 47. In another case, *Howard v. Doolittle*, 3 Duer, 464, it was expressly ruled that the lessor was not responsible for the expenses incurred in shoring up a building leased by him, in order to prevent injuries thereto, by the removal of a building by the adjoining proprietors.

In *Sherwood v. Seaman*, 2 Bosw. 127, the landlord had leased to a tenant the building on lot 252, for a saloon and restaurant, for a term of three years. Grosvenor, the owner of lot 251, notified the landlord of 252 that he intended to excavate lot 251 to lay the foundation of a building thereon, in the

course of which excavation the building on lot 252 fell, and destroyed the lessee's furniture and fixtures to a large amount, and upon these facts it was ruled that the landlord was not liable.

So, too, in California, in similar circumstances, the tenant was killed by the falling walls of the building he occupied, in consequence of an excavation being made on an adjoining lot by the coterminous proprietor; and although the landlord of the building had due notice of the excavation, and that, in consequence thereof, the wall would fall unless proper means were taken to prevent it, and none were taken, yet it was ruled that the landlord was under no obligation to uphold or to repair, and there being, therefore, no breach of duty on his part, no action could be maintained against him by the administratrix of the decedent for damages for the alleged negligent act aforesaid: *Brewster v. De Fremery*, 33 Cal. 341. Authorities on this point, and illustrative of the general principle here involved, might be greatly multiplied. The industry of counsel for defendant has collated many of them.

An elaborate discussion of this subject will be found in 6 American Law Review, 614, in which it would seem that most of the authorities then extant are reviewed. The cases of *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, and *Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54, are not in harmony with well-considered cases elsewhere, and the principle announced in those cases has been repudiated: *Krueger v. Ferrant*, 29 Minn. 385; Indiana: *Purcell v. English*, 86 Ind. 34; and Wisconsin: *Cole v. McKey*, 66 Wis. 500; 57 Am. Rep. 293. The like position is taken in Canada: *Humphrey v. Wait*, 22 U. C. C. P. 580.

There is nothing in the circumstances of this case to exempt it from the operation of the general rule heretofore announced. Adhering to that rule, the instruction heretofore set forth must be condemned as erroneous, and as the plaintiffs have no standing in court, we reverse the judgment, but do not remand the cause for retrial.

LANDLORD AND TENANT. — KEEPING PREMISES IN REPAIR. — A landlord is not bound to keep the leased premises in repair, unless he expressly covenanted to do so: *Burks v. Bragg*, 89 Ala. 204; *Pope v. Boyle*, 98 Mo. 527; *Tomle v. Hampton*, 129 Ill. 379; *Oberfelder v. Doran*, 26 Neb. 118; 18 Am. St. Rep. 771, and note; *Gregor v. Cady*, 82 Me. 131; 17 Am. St. Rep. 466, and note. But see *Sawyer v. McGillicuddy*, 81 Me. 318, 10 Am. St. Rep. 260, and note as to the rule where a landlord leases several tenements to different tenants, with one stairway for the accommodation of them all.

The landlord is liable for injury occasioned from nuisances existing on the premises at the time of the leasing: *Wunder v. McLean*, 134 Pa. St. 334; 19 Am. St. Rep. 702, and note; *Maywood v. Logan*, 78 Mich. 135; 18 Am. St. Rep. 431, and note.

In *Kenney v. Barns*, 67 Mich. 336, where the landlord had leased the lower floor of a house to plaintiffs, and the upper floor to various other tenants, among whom was a secret society, who occupied a room directly over the plaintiff's room, and some one had negligently stopped up the waste-pipe in the room leased by the secret society, whereby an overflow was caused, which injured the plaintiffs, it appearing that the water-pipes and fixtures were not out of repair, it was decided that the landlord was not liable for the damages sustained by such overflow.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

JOSLYN v. KING.

[27 NEBRASKA, 38.]

NEGLIGENCE — RIGHT OF NEGLIGENT PERSON TO RECOVER FOR THE NEGLIGENCE OF ANOTHER. — A LETTER-CARRIER who delivers to the clerk of a hotel a valuable registered letter directed to a guest at the hotel, but which is lost before it reaches the latter, may recover of the clerk, if compelled by the post-office department to pay the loss to the party to whom the letter was addressed.

A. N. Ferguson, for the plaintiffs in error.

Estabrook and Irvine, and W. N. Williams, for the defendant in error.

REESE, C. J. This is a proceeding in error to the district court for Douglas County. The facts, as shown by the pleadings and bill of exceptions, may be briefly stated to be substantially as follows: —

George A. Joslyn was the proprietor of the St. Charles Hotel, in the city of Omaha, and Fred A. Joslyn was his clerk in said hotel. Defendant in error was a letter-carrier under the employment of the post-office department of the United States, and in the course of his business received for delivery a registered letter addressed to "Frank E. Blackmar, St. Charles Hotel, Omaha, Nebraska." He took the letter to the hotel, but the person to whom it was directed not being present, he delivered it to Fred A. Joslyn, the clerk of the hotel, taking his receipt therefor both upon the letter-carrier's book and upon the card for return to the sender of the letter. After accepting and receipting for the letter, F. A. Joslyn placed it

in the letter-box in the office of the hotel. This was about noon in the day. A part of his duties being to act as night-clerk in the hotel, he soon after retired to his room and went to sleep, and did not arise until about six o'clock of that evening, when it was discovered that the letter had been purloined from the letter-box in which he had placed it in the office, and could not be found. Under a regulation of the post-office department, it was the duty of the carrier, defendant in error, to have delivered the letter only to the person to whom it was directed, or upon his written order. Having failed to do this, he was held responsible to the person to whom the letter was directed; and it being shown that the letter contained one hundred dollars in money, he was required to pay the same to Mr. Blackmar, which he did, and then brought suit against plaintiffs in error for the amount so paid out, charging them with negligence in failing to deliver it to the person to whom it was directed. The trial in the district court resulted in a finding and judgment in favor of defendant in error, and for the purpose of reversing this judgment plaintiffs in error bring the cause to this court by proceedings in error.

The facts seem to be substantially conceded as hereinabove stated, the only question presented being whether or not plaintiffs in error were liable under these conditions. It is contended that this liability does not exist, for the following reasons: "1. Defendant in error was negligent himself, in delivering the letter to Fred A. Joslyn for Blackmar and taking his receipt therefor, instead of delivering it to the person to whom it was directed; 2. That plaintiffs in error are not liable, for the reason that it is not shown that defendant in error communicated to Fred A. Joslyn, at the time that he delivered the letter to him and accepted his receipt, that it contained the remittance referred to, or that it was a valuable letter."

While it may be assumed that defendant in error was guilty of negligence in delivering the letter to plaintiffs in error, and that in so doing he became personally liable to the person to whom the letter was directed, yet we fail to see why this should relieve them from responsibility for their own negligence in the matter. In other words, the negligence of defendant in error, in delivering to plaintiffs a letter which should have been delivered to another person, cannot in any degree relieve them of the liability growing out of their own negligence. It is contended that as Fred A. Joslyn did not know that the letter contained a remittance, or was upon a

matter of importance, and that he had never at any time before that received a registered letter, and did not know what it was, he should not be held liable. To this we cannot agree. The fact that a receipt was required both upon the carrier's book and upon the card to be returned to the sender was sufficient to notify him that it was at least an unusual letter, and one which required special care. He seeks to avoid this by saying that he supposed that it was simply what is known as an "immediate-delivery" letter, and not of much importance. This fact would not relieve him; for had it been simply an immediate-delivery letter, the fact of its being such would have been notice to him that it was of more than ordinary importance, and the same care would have been required. The receipt signed by F. A. Joslyn was introduced in evidence. It is the usual printed form in use by the post-office department, with the heading "Registry return receipt," and immediately above the signature "F. E. Blackmar," placed there by him, are also the words "Received the above-described registered letter," in large letters. This, in addition to his signature being required on the carrier's book, was sufficient to charge him with notice that the letter receipted for was of more than ordinary importance, and that special care was required. The bailment was voluntarily assumed upon his part, and care should have been proportionately increased.

The judgment of the district court is affirmed.

NEGLIGENCE. — For a discussion of two or more persons' negligence resulting in an injury to a third person, see extended note to *Village of Curterville v. Cook*, 16 Am. St. Rep. 250-257. Where an accident occurs from two causes, each due to the negligence of different persons, but together the efficient cause, then all the persons are liable, and the negligence of one is no excuse for the negligence of the other: *Gulf etc. R'y Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755; *Georgia P. R'y Co. v. Hughes*, 87 Ala. 610.

BAILMENT — MANDATUM. — A mere mandatary who receives no reward is liable for gross neglect and a breach of orders: *Conner v. Winton*, 8 Ind. 315; 65 Am. Dec. 761; *Eddy v. Livingston*, 35 Mo. 487; 88 Am. Dec. 122.

REYNOLDS v. STATE.

[27 NEBRASKA, 90.]

CRIMINAL LAW — RAPE — INSTRUCTIONS. — On a trial for rape, where the evidence conflicts as to the amount of resistance offered and force used, the prejudice likely to be aroused against the defendant by the heinous nature of the charge, and the difficulty in defending against it, should be pointed out to the jury, and it should be instructed that it is not rape if the woman voluntarily submitted while she had power to resist, no matter how reluctantly she yielded or tardily gave her consent, or how much force had been previously employed.

CRIMINAL LAW — RAPE. — ERROR CANNOT BE PREDICATED by the accused, in a trial for rape, on evidence first drawn out by his attorney on cross-examination.

Hamilton and Trevitt, for the plaintiff in error.

William Leese, attorney-general, for the defendant in error.

MAXWELL, J. An information was filed against the plaintiff in error in the district court of Saunders County charging him with the crime of rape, and on the trial he was found guilty and sentenced to imprisonment in the penitentiary for four years. A large number of errors are assigned in this court, most of which it is unnecessary to notice. The evidence of the prosecuting witness was received through the aid of an interpreter, and while it may be true in its principal features, the examination was conducted in such a manner as practically to put words in the witness's mouth. No objection seems to have been made to this mode of conducting the examination, and it is not ground of error; but as there must be a new trial, and it is evident that the witness has a considerable knowledge of the English language, an effort should be made to take her testimony without the intervention of an interpreter, and as far as possible require her to narrate the facts.

The plaintiff in error asked the court to give the following instruction, which was refused:—

“1. The charge made against the defendant is, in its nature, a most heinous one, and well calculated to create strong prejudice against the accused, and the attention of the jury is directed to the difficulty growing out of the nature of the usual circumstances of the crime, in defending against the accusation of rape. So you, the jury, must carefully consider all the evidence in the case, and the law given you by the court, in making up your verdict.

“You must find, on the part of the woman, not merely a

passive policy or equivocal submission to the defendant; such resistance will not do. Voluntary submission by the woman while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape.

“If the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had theretofore been employed, it is not rape.”

In *Connors v. State*, 47 Wis. 523, Judge Lyon, in delivering the opinion of the court, said of an instruction substantially like the one asked in this case: “The law given by the learned circuit judge to the jury contains a correct statement of the law of the case, as far as it goes, but it does not contain the substance of the rejected instructions. It fails to caution the jury that prejudice was liable to be aroused against the accused because of the heinous nature of the crime charged in the information, or to call their attention to the difficulty growing out of the nature and usual incidents of the crime of defending against an accusation of rape. It did not press upon their attention the principle or rule that voluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. The jury were not expressly told that if the carnal knowledge was with the consent of the woman, no matter how tardily given, or how much force had theretofore been employed, it is no rape. And lastly, the jury were not instructed that proof of the good reputation of the accused as a peaceable and law-abiding citizen (and such proof was given on the trial) was entitled to some weight in his favor, especially if there were circumstances proved on the trial upon which a doubt of his guilt might be predicated. The proposed instructions are not accurately drawn, but they aim to state the above propositions, all of which are well-established rules of law.”

This, we think, is a correct view of the law. The fact that the charge itself will frequently raise a clamor among ignorant and easily biased persons has been recognized by fair-minded judges and law-writers from the time of Chief Justice Hale, at least, until the present time. Even that eminent and impartial judge seems to have given but little thought to the care required in trying this class of cases, until a case came before him where three witnesses, including the prosecutrix, swore positively to the commission of the act, when upon

inspection of the accused it appeared that he could not have committed the offense. Other cases are also mentioned. He says: "I only mention these instances, that we may be more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance": 1 Hale P. C. 636.

In *Oleson v. State*, 11 Neb. 276, it was held that where the prosecutrix was conscious, and had possession of her natural, mental, and physical powers, and was not terrified by threats or in such a position that resistance would be useless, it must appear that she resisted to the extent of her ability. In *Mathews v. State*, 19 Neb. 330, the authorities of this and other states were reviewed, and the doctrine of *Oleson v. State*, 11 Neb. 276, affirmed.

The case of *State v. Burgdorf*, 53 Mo. 65, resembles in some of its features that under consideration, and it was held that a "passive policy, a mere half-way case, will not do." To the same effect, *People v. Abbot*, 19 Wend. 194; *Whittaker v. State*, 50 Wis. 518; *Don Moran v. People*, 25 Mich. 356; 12 Am. Rep. 283; *Whitney v. State*, 35 Ind. 506; *People v. Brown*, 47 Cal. 447; *Taylor v. State*, 50 Ga. 79. The case should be so submitted to the jury as to enable it to consider all the evidence and determine therefrom the question of the guilt or innocence of the accused.

Objection is made to certain questions asked Dr. Mansfelde as an expert. It is sufficient to say that the questions objected to were in the first instance asked by the attorneys for the plaintiff in error, and therefore they cannot predicate error thereon. As there must be a new trial, we will not discuss the testimony in the case.

The judgment of the district court is reversed, and the cause remanded for a new trial.

RAPE—RESISTANCE ON PART OF THE FEMALE. — If a woman finally consents to sexual intercourse, although such consent is reluctant, and is obtained through fear, duress, and fraud, or partly through fear and partly by force, the offense is not rape: *Whittaker v. State*, 50 Wis. 518; 36 Am. Rep. 856, and note 860-862, as to the extent to which the woman must carry her resistance. See also *People v. Crosswell*, 13 Mich. 427; 87 Am. Dec. 774, and note. However, one may be convicted of an assault with intent to commit rape, even though the woman finally consented: *State v. Bagan*, 41 Minn. 285.

BLACKWELL v. WRIGHT.

[27 NEBRASKA, 269.]

USURY, EVIDENCE OF NOTICE OF. — Where, in an action to recover on a note secured by chattel mortgage, and alleged to have been purchased for value, and *bona fide*, before maturity, the defense is interposed that the note was tainted with usury, of which the purchaser had notice at the time of purchase, proof of the fact alone that the purchaser knew that the payee of the note was loaning money at a usurious rate of interest would not of itself be sufficient to charge such purchaser with notice of the defense of usury, yet it would be competent as a circumstance to be considered, in connection with other proven or admitted facts, as tending in that direction, and for this reason is admissible.

WITNESS CANNOT BE IMPEACHED BY PARTY CALLING HIM, but such party may prove the truth by other witnesses, even though they contradict the witness first called.

USURY — BURDEN OF PROOF. — Where the note sued on by the holder, who claims to be a purchaser, before maturity, in good faith and for value, is shown to be tainted with usury, the burden of proving the good faith of the transaction, without notice of the usury, is upon such purchaser.

L. G. Hurd and Robert Ryan, for the plaintiffs in error.

Agee and Stevenson, and Hainer and Kellogg, for the defendant in error.

REESE, C. J. This was an action in replevin, instituted in the district court of Hamilton County by the assignee of the mortgagee, for the possession of certain personal property mortgaged by defendant in error to Updike and Titus for the purpose of securing the payment of a promissory note made by defendant to them, which note, it is claimed by plaintiffs, was indorsed to them by the payee, before maturity, in the due course of trade, and for value. The defense presented was, that the note was tainted with the vice of usury; that it was a renewal of a number of preceding notes upon which interest had been paid more than sufficient to cancel the original indebtedness; with a denial of plaintiffs' claim that they were good-faith purchasers before maturity.

A jury trial was had, which resulted in a verdict in favor of defendant, finding the value of the property in dispute to be \$408, and assessing his damages at \$5. A motion for a new trial was filed, based upon the following grounds: "1. The verdict is not sustained by sufficient evidence; 2. Errors of law occurring at the trial and duly excepted to; 3. The verdict is contrary to law."

Before a ruling upon the motion for a new trial was made, the defendant remitted \$4.99 from the verdict for damages,

when the motion was overruled, and judgment was rendered for a return of the property and one cent damages, or if a return could not be had, for \$408, the value of the property.

From this judgment the cause is brought to this court by plaintiff by proceedings in error.

Upon the trial plaintiff placed George W. Updike, a member of the firm of M. D. Blackwell & Co., plaintiffs, who are bankers in Harvard, upon the witness-stand for the purpose of identifying the note and mortgage and proving ownership thereof, and demand of defendant for the possession of the property in dispute; and after the introduction of the note and mortgage, plaintiff rested his case. Defendant thereupon recalled the same witness for the purpose of proving the circumstances under which the note was purchased, by which, doubtless, he desired to throw suspicion upon the transaction, and show thereby that the transfer was colorable only, and with intent to deprive defendant of any defense he might have to the note in the hands of the payees, Updike and Titus, which was also a banking firm doing business in Harvard, and which consisted of Edmund Updike and I. J. Titus. The testimony of this witness, while given with apparent candor, was not such as would fully establish the fact sought to be shown by defendant. In this connection defendant was permitted to interrogate him as to his knowledge of the methods of Updike and Titus in their business transactions, and the rate of interest charged by them; Updike, of the firm of Updike and Titus, being a brother of the witness. It was shown that the rate of interest usually charged was more than the legal rate, of which the witness had knowledge. This was doubtless for the purpose of impeaching the *bona fides* of the purchase. While the fact alone that the purchaser of the note knew that the vendor and payee was loaning money at a usurious rate might not of itself be sufficient to charge the purchaser with notice of the defense of usury, yet it would be competent as a circumstance to be considered, in connection with other proven or admitted facts, as tending in that direction; and the court did not err in overruling plaintiff's objection to the question asked.

The note and mortgage were offered and received in evidence, and are referred to in the bill of exceptions as exhibits A and B, but are not attached thereto, nor is a copy of either to be found therein. We are unable, therefore, to say just when the note matured. George W. Updike, when called by

plaintiff, testified that the purchase was made between the 20th and 30th of July, 1886. He also testified to the same thing, in substance, when called as a witness by defendant. We may assume, perhaps, that upon its face the note matured the first day of the following September, but of this there is no proof in the record. After George W. Updike had thus testified, defendant called other witnesses for the purpose of proving that on the thirtieth day of July he had offered to sell the note at a heavy discount, and that he had not seen defendant, nor learned of his proposed defense, until about the 6th of August. The objection to this evidence is, that it was offered for the purpose of impeaching the defendant's own witness, George W. Updike, and therefore it was incompetent. While we fully recognize the principle of law contended for by plaintiff in error, that a person may not impeach the character of his own witness, and that having called him was equivalent to a recommendation that he was entitled to belief, which could not be contradicted, yet we do not apprehend that the testimony offered by defendant would fall under this rule. The rule will not prevent a person from proving the fact to be different from that which is stated by his own witness. The witness may be mistaken, may be misinformed, or he may have misled the party calling him. In either event, the party so calling him would not be prevented from showing the exact facts as they occurred, and this is not considered an impeachment of his witness.

It is contended that these facts, if true, have no significance whatever, and were improperly admitted in evidence. While it is no doubt true that there is nothing very convincing in the evidence introduced, yet it was competent as a circumstance tending to show the want of good faith in the purchase of the note. If, immediately after the alleged purchase, and before plaintiff in error had an opportunity to see defendant, or had any knowledge as to what his purpose was, they went upon the market and sought to sell the note at a heavy discount, it would be competent to show that fact as tending to throw some light upon their alleged *bona fides*. While it is true that the evidence was not of as high a quality perhaps as might be desired, yet it would have some tendency to throw light upon the conduct of the parties, and for that purpose would be competent for the consideration of the jury, and to be given such weight, and only such, as they might deem it entitled to.

It was contended and urged by defendant in error, on the

trial, that the note referred to was a final renewal of a long series of notes which had been executed to the bank of Updike and Titus, and while upon the witness-stand he exhibited what he claimed to be the notes which had formerly been executed to that bank, and of which the note in question was a renewal. These ran from exhibit C to exhibit Z, and showed a large increase over the original note, notwithstanding indorsements aggregating a large amount upon the notes referred to. They were presented by him, and identified and introduced in evidence. Not having the note involved in this suit, nor a copy of it, before us, and having no proof as to the amount for which it calls, we, of course, cannot enter upon an examination of this question. The various notes were payable to Updike and Titus, and it was for the jury to say, after hearing all the evidence, whether or not the note in question was a renewal of the indebtedness represented by them in the order of their dates.

It is insisted that as section 13 of the Civil Code permits an action to be instituted upon a statute for a penalty or forfeiture only within one year from the time the cause of action accrued, the court erred in permitting defendant to show the alleged payments upon a claim to Updike and Titus more than one year prior to the commencement of the action. This was not an attempt on the part of defendant to enforce a statute penalty nor a forfeiture, but was for the purpose of showing that the indebtedness, which was the basis of plaintiffs' action, had been paid, and that therefore they were not entitled to the possession of the property described in the mortgage. Had the action been instituted by Updike and Titus, there can be no doubt but that it would have been entirely competent for the defendant to introduce,—1. The proof of the usury, and 2. The evidence that he had entirely paid the debt, and that there was nothing due. Now, if the transfer to Blackwell & Co. were not in good faith and for value, or if they purchased with notice of the rights of defendant, then the evidence would be competent for the same purpose as against plaintiffs in error. In this the court did not err.

Some objection is made to the ruling of the court upon the question of damages, but as the jury returned a verdict for \$5, and as \$4.99 of that sum was remitted, it is not deemed necessary to examine this question.

The next contention is, that the verdict of the jury is not

sustained by sufficient evidence; that there was not sufficient proof to establish the fact that the plaintiffs were not purchasers of the note and mortgage referred to in good faith and for value, and that the verdict should have been in their favor. It is conceded that the usury having been shown, which is perhaps not denied, the burden of proving the good faith of the transaction is upon the party relying upon the fact of the purchase without notice of the usury: *Darst v. Backus*, 18 Neb. 231. While it is true that the evidence submitted to the jury may leave the question of the *bona fides* of plaintiffs in doubt, yet we apprehend that there is no doubt but that the note and the whole transaction were tainted with usury of rather a rapacious character. The proof shows that perhaps a short time before the maturity of the note the firm of Updike and Titus claim to have transferred the note to Blackwell & Co. Edmund Updike, of the firm of Updike and Titus, was a brother of George W. Updike, of the firm of Blackwell & Co.

It is said by some of the witnesses on the part of plaintiff that the note was purchased as an investment, while it is said by others that Updike and Titus were indebted to Blackwell & Co. in a large amount, and that they desired the payment of the money, which could not be made without embarrassment to Updike and Titus, and upon their request Blackwell & Co. accepted a part of the demand in promissory notes; so that it may be doubted whether or not the purchase of the note was a voluntary investment by Blackwell & Co., or whether they were not taken as the best means of collecting a pre-existing debt. Blackwell & Co. were familiar with the methods of Updike and Titus in the transaction of their business and as to the rate of interest charged.

The testimony introduced by plaintiffs in error is not entirely consistent with good faith on their part, and we cannot see that the verdict is so clearly against the weight of evidence as to require that it be set aside, the burden being upon plaintiffs.

Finding no error in the proceedings, the judgment of the district court must be affirmed, which is done.

USURY. — To charge one with usury, he must have known of and been a party to the intent to violate the law: *Jackson v. Travis*, 42 Minn. 438. A transaction by which a grossly usurious note was transferred to a third party, as alleged, before due, for a valuable consideration, but in which neither the purchaser nor seller can state what had been paid or the manner of paying the same, fails to establish a *bona fide* purchase: *Lincoln Nat. Bank v. Davis*,

25 Neb. 377. The fact that a mortgage void for usury has been foreclosed where the purchaser at the sale had notice of the usury, does not prevent the mortgagor from avoiding the sale and mortgage: *Scott v. Austin*, 36 Minn. 460.

USURY — BURDEN OF PROOF. — Where usury in the original transaction for which negotiable promissory notes were given is shown, the party who claims to have purchased the notes before maturity must assume the burden of showing that he is a *bona fide* purchaser before maturity without notice: *Knox v. Williams*, 24 Neb. 630; 8 Am. St. Rep. 220; *Lincoln Nat. Bank v. Davis*, 25 Neb. 376.

WITNESSES — IMPEACHMENT. — While a party cannot impeach his own witness, he is not precluded from showing the truth of any particular by any other competent testimony: *Omaha etc. Ref. Co. v. Tabor*, 13 Col. 41; 16 Am. St. Rep. 185, and note.

EARLE v. EARLE.

[27 NEBRASKA, 277.]

JURISDICTION. — COURTS OF COMMON-LAW AND EQUITY JURISDICTION are not necessarily limited to the provisions of the state statute in matters of jurisdiction, and may render such decrees in equity cases as the nature of the case requires.

HUSBAND AND WIFE. — SEPARATE SUIT FOR ALIMONY and support may be maintained by the wife in equity, independent of a suit for divorce.

Estabrook and Irvine, and A. Steere, Jr., for the plaintiff in error.

Savage, Morris, and Davis, for the defendant in error.

REESE, C. J. This action was instituted in the district court of Douglas County, by the wife against the husband, for maintenance and support, but without a prayer for divorce. It was alleged in the petition, substantially, that plaintiff and defendant were married on the fifteenth day of May, 1871; that the issue of the said marriage was one child, born in July, 1879; that on or about the first day of January of that year, defendant sent plaintiff away from him, and has ever since refused to permit her to return, contributing to her support and maintenance separate and apart from himself; that in the month of August, 1885, defendant ceased and refused to further provide for the support of plaintiff and their said child, and at no time since that date has he contributed or offered to contribute in any way to their support or maintenance; that plaintiff was entirely without means to support herself and child during the pendency of the suit; that she was also without means to carry it on; that her daughter, the child afore-

said, now seven years of age, was wholly dependent upon her (the plaintiff) for support, maintenance, care, and education; that defendant was an officer in the United States army, commissioned as first lieutenant, and receiving a salary of \$120 per month.

The prayer of the petition was, that defendant be required to pay plaintiff a reasonable sum for her maintenance and support during the pendency of the suit, and such further sum as would enable her to carry on the action, and that on a final hearing she be decreed reasonable alimony out of the property and income of defendant, together with the costs, etc., with prayer for general relief.

To the petition defendant interposed a demurrer, upon two grounds: 1. That the court had no jurisdiction of the subject of the action; and 2. That the petition did not state facts sufficient to constitute a cause of action.

This demurrer was sustained by the district court, to which plaintiff excepted, and upon her refusing to amend or further plead, the cause was dismissed.

The case is presented to this court by proceedings in error, the error assigned being that the court erred in sustaining the demurrer.

The question presented is, whether or not an action for maintenance and support can be maintained in this state when not coupled with a petition for a divorce, either from the bonds of matrimony or from bed and board.

Upon this question the statutes of this state are substantially silent. The nearest approach to authorizing an action of this kind is found at section 40 of chapter 25, Compiled Statutes, entitled Divorce and Alimony. The chapter provides for divorce of two kinds, to wit, of divorce from the bonds of matrimony and from bed and board.

Section 40, in treating of an action for a divorce from bed and board, provides that "in case of an application for a divorce from bed and board, although a decree for such divorce be not made, the court may make such order or decree for the support and maintenance of the wife and children, or any of them, by the husband, or out of his property, as the nature of the case may render suitable and proper." While it appears that an order of the kind sought in this case cannot perhaps be made except in an action for a divorce from bed and board, yet it is specially provided that the authority of the court to make an order for the maintenance of the wife or children, or

either of them, by the husband shall not depend upon a decree of divorce from bed and board having been rendered, but that such order may be made without reference thereto. By this section the court is given the authority and jurisdiction to render a decree of the kind sought by the plaintiff, but it is contended that such order can only be made in an action for a divorce of the kind named.

Assuming that this section does not give the court the authority to make the order claimed by plaintiff, but of which there may be some doubt, it then becomes necessary to inquire whether a court of equity would have the jurisdiction independent of any statutory provision upon the subject.

We apprehend that courts of common-law and equity jurisdiction are not necessarily limited to the provisions of the statutes in matters of jurisdiction, and might perhaps render such decrees in equity causes as the nature of the case would require, assuming that the plaintiff showed that she was entitled to equitable relief.

This question has been before the courts of some of the states, and it seems that a majority have decided that courts of equity would not have jurisdiction to enter a decree of the kind prayed for, while others have held that such jurisdiction did exist.

It is a well-established rule of law that it is the duty of the husband to provide his family with support and means of living, — the style of support, requisite lodging, food, clothing, etc., to be such as fit his means, position, and station in life; and for this purpose the wife has generally the right to use his credit for the purchase of necessities. At common law, where the husband heedlessly and wantonly and from improper motives refused a wife the necessary comforts of life, and refused to provide for her, a criminal prosecution with recognizance was sometimes resorted to, for the purpose of compelling a competent husband to support his family: Schouler on Husband and Wife, sec. 66. It is the common expression of all writers, found in the text-books, that there is no wrong without some remedy. Now, if the allegations of the petition are true, which the demurrer admits, there is evidently a wrong. The question is, whether or not the plaintiff shall be compelled to resort to a proceeding for a divorce, which she does not desire to do, and which probably she is unwilling to do, from conscientious convictions, or, in failing to do so, shall be deprived of that support which her husband is bound to give her. The

authority or jurisdiction to grant divorces was exercised in England by the ecclesiastical courts, which have never existed in this country, and therefore no court has such jurisdiction here except by statute. But the authority to grant alimony grows out of the equity powers of the court.

While the statute-books of this and other states amply provide for the granting of divorces in meritorious cases, yet we do not apprehend that it is the purpose of the law to compel a wife, when the aggrieved party, to resort to this proceeding, and thus liberate her husband from all obligations to her, in order that the rights which the law gives her, by reason of her marital relations with her husband, may be enforced. Such a conclusion would not generally strike the conscience of a court of equity as being entirely equitable.

In *Butler v. Butler*, 4 Litt. 202, the court says: "It is clear that strong moral obligations must lie on any husband who has abandoned his wife to support her. The marriage contract, and every principle, binds him to this. If he fails to do it, it is a wrong acknowledged by common law, though the law knows no remedy, because the wife cannot sue the husband; but in equity the wife can sue the husband, and it is the province of the court of equity to afford the remedy where conscience and law acknowledge a right, but know no remedy. Why, then, should the chancellor shrink at this case, and refuse a remedy?"

In *Galland v. Galland*, 38 Cal. 265, this rule was followed, but by a divided court. From the *syllabus* in that case we quote the following:—

"Provisions for alimony made in the statutes concerning divorces are not intended to be a prohibition to the granting of alimony in other cases. The power to decree alimony falls within the general powers of a court of equity, and exists independent of a statutory authority, and in the exercise of this original and inherent power a court of equity will in a proper case decree alimony to the wife in an action which has no reference to a divorce or separation."

In *Garland v. Garland*, 50 Miss. 694, in which there is a pretty general review of the cases, the court says: "Courts of equity in America should always interpose to redress wrongs when the complainant is without fair and adequate and complete remedy at law. Here there is no such process as *supplicavit*, nor a distinct proceeding for the restitution of the conjugal relation. If a wife is abandoned by her husband, without

means of support, a bill in equity will lie to compel the husband to support the wife, without asking for a decree of divorce." See also *Almond v. Almond*, 4 Rand. 662; 15 Am. Dec. 781; *Purcell v. Purcell*, 4 Hen. & M. 506; *Jelineau v. Jelineau*, 2 Desaus. Eq. 45; *Prince v. Prince*, 1 Rich. Eq. 282; *Graves v. Graves*, 36 Iowa, 310; 14 Am. Rep. 525; 2 Bishop on Marriage and Divorce, secs. 354 et seq.; *Glover v. Glover*, 16 Ala. 440; *Wray v. Wray*, 33 Ala. 187.

The cases cited in defendant's brief show that the states of Indiana, New Hampshire, Missouri, New York, Massachusetts, New Jersey, Michigan, and Louisiana have held to the opposite doctrine.

There being this conflict in the decisions of the courts, it becomes the duty of this court to decide the case upon what may be deemed the soundest principles, and those most in consonance with the spirit of the present civilization and of our law. As we have already said, in substance, there is not much to commend an alleged principle of equity which would hold that the wife, with her family of one or more children to support, must be driven to going into court for a divorce when such a proceeding is abhorrent to her, or in case of her refusal so to do, being compelled to submit to a deprivation of the rights which equity and humanity clearly give her; that in order to obtain that to which she is clearly entitled, she must institute her action for a divorce, make her grievances public, which she would otherwise prefer to keep to herself, and finally liberate a husband from an obligation of which he is already tired, but from which he is not entitled to be relieved. It seems to us that a declaration of such a doctrine as the law of the land would place it within the power of every man who, unrestrained by conscience, seeks to be freed from his obligations to his wife and family, by withholding the necessary comforts and support due them, to compel her to do that for him which the law would not do upon his own application. This, it seems to us, must have been the view of the legislature in the enactment of the law of divorce and alimony, which we have hereinbefore copied. But however that may be, we are of the opinion that courts of equity should have, and do have, the jurisdiction to grant relief in cases of this kind without reference to the statutes of the state, but by and through the jurisdiction growing out of the general equity powers of the court.

The judgment of the district court is reversed, the demurrer overruled, and the cause remanded for further proceedings.

EQUITY — ALIMONY WITHOUT DIVORCE. — Courts of equity have jurisdiction to grant alimony without divorce: Note to *Methvin v. Methvin*, 60 Am. Dec. 666; *Johnson v. Johnson*, 125 Ill. 510.

AVERY v. BAKER.

[27 NEBRASKA, 388.]

INJUNCTION TO RESTRAIN SALE OF CHURCH PROPERTY — PARTIES. — Where a church building has been erected by voluntary contributions made under agreement that the building is to be used for certain specified purposes, a contributor may enjoin a sale of the property, where no sufficient reason is shown for the attempted sale and its effect would be to divert the funds from the use intended. It is not necessary for all of the contributors to join in the suit to restrain such sale.

APPEAL from a judgment sustaining a demurrer to plaintiff's petition.

H. C. Brome, for the appellants.

Wigton and Whitham, for the appellees.

MAXWELL, J. The demurrer is upon two grounds: 1. That there is a defect of parties plaintiff; and 2. That the petition does not state a cause of action. The action is brought primarily to restrain the defendants, in behalf of certain contributors to the erection of the church edifice, in which case, while it is proper to bring all who have contributed to that purpose before the court to prevent a multiplicity of suits, yet in a case like that set forth in the petition, a person who, in pursuance of an agreement set forth in the subscription list, has furnished funds to aid in the construction of a building for a public purpose, and which funds have been applied to that purpose, has a right to insist that such building shall not, without good cause, be converted to other uses; and he may maintain an action, either in his own name or on behalf of all the subscribers, to prevent a violation of the contract. In such case, all the parties in interest are not required to join as plaintiffs. Where one of the primary objects of the suit is to quiet title, it is necessary that all parties in interest be made parties either as plaintiffs or defendants, unless they are so numerous that it is impracticable to bring them all before the court. This is not the case here, and it is prob-

able that the plaintiffs cannot maintain an action to quiet title. There is a defect of parties defendant, however, as the trustees should have been joined; but that objection is not raised by the demurrer. If the allegations of the petition are true, the plaintiffs were residents of the village of Battle Creek, and there being no church of the Protestant faith in that village or vicinity, they contributed to the erection of the building in question. It was "further understood and agreed that said church building so to be erected was to be for the use and religious benefit of the residents of said village, and should always continue to be so, to be used for church purposes."

"It was further understood that the residents of Battle Creek were to have the privilege of using said building for the purpose of having lectures and concerts of a religious nature held therein," etc.; that a church edifice was erected and used for the purpose for which it was built for two years, when it was attempted to be sold to the defendants, and no building to be erected in its place or within eight miles of Battle Creek. These facts, on their face, would seem to entitle the plaintiffs to relief. If the allegations of the petition are true, the money contributed by the plaintiffs was paid in pursuance of a specific agreement that it was to be applied in the erection of the building in question. Such a building in a small village like Battle Creek no doubt enhanced the value of every piece of property in the village, and thus, aside from its use for the Baptist society, lectures, concerts, etc., was a direct benefit to the property owners. A church organization, like any other, must act in good faith with those contributing to the erection of an edifice for its use. A church edifice is the result, ordinarily, of many voluntary subscriptions. It would be the property of those who contributed to its erection, but for the fact that it was made as a donation to a particular society. The donation, however, is for a particular purpose, — the erection of a church edifice. The money so contributed cannot be diverted and applied to another use without the donors' consent, — as the erection of a building for a college, however much the latter might be needed. If good faith requires the application of the money to the uses for which it was designed, the same rule would seem to apply after the building was erected. If without adequate cause a religious society may sell a church building erected by voluntary contributors for that purpose, to carry on the mercantile or other business

therein, and the persons who furnished the funds to erect the building be without remedy, the power would be liable to great abuse. But no society possesses such power. Justice and right between individuals lie at the foundation of the Christian religion, and this rule is as binding upon the various religious organizations as upon individuals. No sufficient cause being shown for the attempted sale of the building in question, the plaintiffs had a right, so far as appears, to enjoin the sale and transfer to the defendant.

The judgment of the district court is reversed, and the cause remanded, with leave to answer, and for further proceedings.

RELIGIOUS SOCIETIES. — Where property is held by a religious society in trust for its members, none of the members, although a majority so desire, can divert the church property to a different use from that for which it was purchased: *Baker v. Ducker*, 79 Cal. 365. Compare *Roshi's Appeal*, 69 Pa. St. 462; 8 Am. Rep. 275, and note. And an injunction will lie at the instance of the minority of the church members to restrain an unlawful diversion of church property on the part of the majority: *Hale v. Everett*, 53 N. H. 9; 16 Am. Rep. 82.

STATE v. CLEVINGER.

[27 NEBRASKA, 422.]

NEW COUNTIES — JURISDICTION OF OFFICERS OF OLD COUNTY OVER NEW COUNTY. — Where a new county is organized out of the territory of an old county, the jurisdiction and duties of the officers of the latter over the territory included in the former cease; and the treasurer of the old county cannot be compelled by *mandamus* to collect unpaid taxes from the new county which were levied prior to the division. In such case, where one of the counties is not a party to the action, it cannot be decided who is entitled to such taxes.

M. B. Malloy, pro se.

W. F. Clevenger, pro se.

REESE, C. J. This is an original application for a *mandamus* to defendant, who is the county treasurer of Brown County, to require him to collect from the tax-payers of what is now Rock County the unpaid taxes for the years 1884, 1885, 1886, 1887, and 1888, levied while the territory which now comprises Rock County constituted a part of Brown County, which said taxes were levied by the taxing officers of Brown County.

It appears from the relation and stipulation of the parties

that Brown County was duly organized on the twenty-third day of July, 1883, consisting of the territory now included in Brown and Rock counties; that the county boundaries continued as then established until the first day of January, 1889, when, by virtue of the elections held prior to that date, the new county of Rock was duly organized, and its permanent officers assumed charge of the county government; that during the years 1884 to 1888, inclusive, the taxing officers of Brown County levied the usual taxes on the property within the county boundaries, a part of which remains unpaid, and upon which the county of Brown issued its warrants to the extent of eighty-five per cent of the levy.

Practically two questions are presented, which are: 1. Is Brown County entitled to these unpaid taxes? and 2. If so, is it the duty of the treasurer of said county to make the collections?

The latter question would doubtless have to be answered in the negative, whatever might be the conclusion as to the first, as the duties and jurisdiction of the county treasurer would be limited to the territorial boundaries of his own county.

Since Rock County is not made a party to this action, no order or judgment can be rendered which would be binding upon it, and therefore the question as to who is entitled to the revenues, as between the two counties, cannot be decided.

In the stipulation filed we observe that it is agreed that the taxes in question are "due Brown County," and this suggestion is of frequent occurrence throughout the stipulation. For example, in the tenth paragraph of this paper, after showing the assessment and levy, it is said that "the greater part (of the taxes) has been delinquent and unpaid, and is due Brown County; that the respondent refuses to collect said taxes from the citizens of Rock County, or to make an effort to collect the personal taxes from them, for the aforesaid years, that are due Brown County," etc. While we presume that nothing is claimed by this phraseology, and that it is used to convey the idea that the taxes were levied by the officers of Brown County prior to the division, yet should we conclude that it was the purpose to agree that the taxes were due Brown County, that could make no difference, as the question as to whom the taxes are due is one of law resulting from the existing facts, and not one of fact to be proven or otherwise established. The question presented, while new in its application to this case, is not new in principle in many of its aspects. In

Fremont etc. R. R. Co. v. Brown Co., 18 Neb. 516, and in *Morse v. Hitchcock Co.*, 19 Neb. 566, questions somewhat similar to these in point of fact were presented, and it was decided, as it must be in this case, that upon the organization of a new county the jurisdiction and duties of the officers of the old county over the territory included in the new cease, and the administration of the affairs of the new county should be conducted only by its own officers. But there appears to be a distinction made by our statutes between new counties formed out of unorganized territory and those created by the division of a county already organized. The law governing new counties of the former class is fully reviewed by Judge Maxwell in *Fremont etc. R. R. Co. v. Brown Co.*, 18 Neb. 516, and need not here be referred to. That governing those of the former class is to be found in sections 10 to 18, inclusive, of the same chapter (18) of the Compiled Statutes. Section 16 provides for a division of property, personal and real, choses in action, debts, liabilities, etc., between the counties. But whether this applies to uncollected taxes cannot now be decided, for the reason above given, that the necessary parties are not before the court. It must be sufficient now to say that there is no duty devolving upon the defendant in connection with the collection of the taxes referred to, and therefore the writ cannot issue.

Judgment accordingly.

NEW COUNTIES — THEIR RELATION AND THAT OF THEIR OFFICERS TO OLD COUNTIES. — Unless a limitation exists in the constitution of a state, the power of the legislature is absolute, by general or special statute, to provide for a change of the boundaries, the division, addition, consolidation of existing counties, or the creation and organization of new counties. This doctrine is so well settled, without conflicting authority, that it may be well said to be of universal and unquestioned application, and that it finds its reason in the essential nature of counties as political subdivisions of the state, and as the subject creatures of its sovereign will: *Portwood v. Board of Supervisors*, 52 Miss. 523; *State v. Board of Commissioners*, 12 Kan. 426; *Commissioners of Dare Co. v. Commissioners of Currituck Co.*, 95 N. C. 189; *Pulaski Co. v. County Judge*, 37 Ark. 339; *Rumsey v. People*, 19 N. Y. 41; Opinion of the Justices, 6 Cush. 578.

As the legislature has exclusive power to provide for the organization of new counties, a legislative recognition of a defective and even fraudulent organization will make it valid: *State v. Board of Commissioners*, 12 Kan. 426. But when the organization of the county is obtained by fraud, a *quo warranto* will lie against the persons assuming to act as officers of such organization; which may be declared void: *State v. Commissioners*, 12 Kan. 441. The legislature, also, has power to entirely abolish a county organization: *State*

v. Hamilton, 40 Kan. 323. Or it may delegate its powers to organize counties: *Commissioners v. Spittler*, 13 Ind. 235.

The legislature may provide that the inhabitants of the new county shall be taxed to pay a proportionate part of the debts of the county from which it has been severed, or it may exonerate them from such debts: *Commissioners of Dare Co. v. Commissioners of Currituck Co.*, 95 N. C. 189; *Portwood v. Board of Supervisors*, 52 Miss. 523. Where the legislature has created a new county out of territory formerly belonging to other counties, and to compensate such counties for the loss of territory occasioned by the creation of the new county has added territory to them from adjoining counties, it is competent for the legislature to provide that the county receiving the accession of territory shall pay an equitable proportion of the indebtedness of the county from which such territory has been taken: *Commissioners v. Auditor*, 1 Ohio St. 323; *Pulaski Co. v. County Judge*, 37 Ark. 339. A general law providing for the apportionment of debts and credits in all cases where new counties are created does not deprive subsequent legislatures of the power to provide otherwise as to counties created by it: *Forest Co. v. Langdale Co.*, 76 Wis. 605.

Where part of a county is separated from it by annexation to another, or by the creation of a new county, the remaining part of the county retains all its property, power, rights, duties, and privileges, and remains subject to all its obligations and duties, unless some express provision to the contrary is made by the act authorizing the separation and annexation or creation of a new county: *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Town of Depere v. Town of Bellevue*, 31 Wis. 120; 11 Am. Rep. 602. Thus when a new county is carved out of the territory of adjoining counties, the legislature has sole power to determine to what extent the residents of the detached portions shall bear the burden of the indebtedness of the counties to which they formerly belonged; and in the absence of legislative provision, the new county will be entirely freed from the indebtedness of the counties from which its territory was taken. Therefore provision that the detached portions shall be liable for their *pro rata* share of the debts of the county from which they were taken does not subject the new county to a proportionate liability for contingent liability arising out of a breach of duty, as for the bad state of repair of a bridge within the original territory of one of such other counties: *Askeo v. Hale Co.*, 54 Ala. 639; 25 Am. Rep. 730. And where, by statute, part of the territory of one county is taken from it and annexed to another, and no provision is made for the liability of the county acquiring the territory for any portion of the indebtedness of the county losing the territory, the former cannot be compelled to pay any part of the indebtedness for which the acquired territory was bound in the other county before its separation therefrom: *Board of Supervisors v. Board of Supervisors*, 58 Miss. 619; *County Commissioners v. County Commissioners*, 1 Wyo. 137. But it is competent for the legislature to apportion the property and the burden of indebtedness between the old and the new counties, as it may deem proper, and compel taxation for the purpose of discharging it: *Eagle v. Beard*, 33 Ark. 497; *Board of Supervisors v. Board of Supervisors*, 62 Miss. 325; *Establishment of New Counties*, 9 Col. 639; *Canova v. State*, 18 Fla. 512. When a new county is created out of part of an old one, the old county takes the county property, and becomes liable for the whole of the county indebtedness, in the absence of legislative provision to the contrary: *Gilliam Co. v. Wasco Co.*, 14 Or. 525; *Reeves Co. v. Pecos Co.*, 69 Tex. 177. In such case, the old county may be compelled to pay the whole of the state levy of taxes charged upon the

county at the time that the division took place: *Gilliam Co. v. Wasco Co.*, 14 Or. 525.

The legislature may, in dividing a county, relieve the personal property of the detached territory from all liability for previous debts of the county, while continuing the liability of all the other property: *Commissioners of Ottawa Co. v. Nelson*, 19 Kan. 234; 27 Am. Rep. 101. As the rule for the apportionment of the debts and property between the two counties upon division belongs exclusively to the legislature, and not to the courts, it follows that when the legislature has determined how the debts and property shall be divided and apportioned, the courts cannot interfere: *Commissioners of Sedgwick Co. v. Bunker*, 16 Kan. 499. An action at law will lie, however, against the new county in favor of one of the old counties from which it was taken, for its *pro rata* share of the existing debt of the old county, as ascertained and certified by its commissioners' court, as provided by the statute creating the new county: *Chambers Co. v. Lee Co.*, 55 Ala. 534.

A county, by receiving territory detached by statute from that of another county, is under moral obligation to pay a just and equitable proportion of the latter's debt existing at the time of the enactment of the statute; and when the act segregating the territory is silent as to such payment, the legislature may provide for enforcing it by subsequent statute: *Perry Co. v. Conway Co.*, 52 Ark. 430. While the legislature may enter into an investigation to ascertain and determine the ratable proportion of existing liability to be assumed by the new county, it is also within its power to remit the same to the appropriate local authorities under suitable legislation: *Creation of New Counties*, 9 Col. 624.

If a statute providing for the organization of a new county, and that the fractions taken from the old county to form the new shall continue liable for their *pro rata* share of all debts contracted by their respective counties prior to the separation, the remedy of either of the old counties is against the citizens and property of the fractional portions of the new county formerly belonging to it, and not against the new county: *Blount Co. v. Loudon Co.*, 8 Baxt. 74.

Where the act creating a new county provided that it should pay its *pro rata* share of the debt of the county to which its territory formerly belonged, but contained no provision giving it any interest in the property of the old county, it was decided that the new county could not recover its *pro rata* of the proceeds of the sale of certain stock owned by the old county, although the debt of the old was in fact to pay for the stock: *Commissioners of Dare Co. v. Commissioners of Currituck Co.*, 95 N. C. 189. If the territory of one county is partly detached therefrom, and attached to another county, and prior thereto the first-named county issued bonds for the payment of bridges to be built therein, none of which are within the detached territory, this fact does not legally or equitably relieve the detached territory from contributing to the payment of such bonds: *Board of Commissioners v. Board of Commissioners*, 26 Kan. 181. But where a county, in 1872, issued bonds for the purpose of building a court-house and jail, and another county was created out of part of the former county in 1873, it was decided, in a proceeding instituted to determine what part of the indebtedness of the old county should be assumed by the new, that before the bonds were negotiated they constituted no part of the indebtedness of the old county, and that the new county was only liable for its proper proportion of the amount of such bonds as had been negotiated when the act creating it was passed: *Hempstead Co. v. Howard Co.*, 51 Ark. 344. So refunding bonds executed and issued by an old

county, without a vote of its electors as required by law, are not a liability against territory subsequently detached from that county and added to another, nor can any tax be levied upon the detached territory to pay such bonds: *Board of Commissioners v. Board of Commissioners*, 42 Kan. 409.

In the case of *Trinity Co. v. Polk Co.*, 58 Tex. 321, a statute attached a portion of Trinity County to Polk County, and provided that "the citizens in said detached portion of Trinity County shall pay their *pro rata* portion of the county indebtedness up to the date of the passage of this act." Trinity County afterwards brought suit against Polk County to recover the *pro rata* portion of its indebtedness alleged to be owing by the citizens living in the detached portion, and in the alternative to recover the detached territory, and the court decided that upon the approval of the act the detached territory became absolutely and unconditionally a part of Polk County: that Trinity County could not recover back such territory, nor the amount levied and collected by Polk County upon the subjects of taxation therein, nor could it recover of Polk County a *pro rata* of the debt of Trinity County, nor cause the former county to levy and collect a tax on the detached portion of the latter county to pay any portion of its debt. The only remedy of Trinity County was against the citizens of the detached portion of that county.

Where county lines are changed, and territory is detached from one county and attached to another, or a new county is thus formed, the county acquiring the territory, or the new county, is not entitled to any portion of the funds of the old county from which it was detached, when the statute detaching the territory or creating the new county is silent on the subject: *Commissioners of Crawford Co. v. Commissioners of Marion Co.*, 16 Ohio, 467; *Washington Co. v. Weld Co.*, 12 Col. 152; *Cooke v. School District No. 12*, 12 Col. 453; *Board of Supervisors v. Board of Supervisors*, 64 Miss. 534.

In regard to the apportionment of taxes between the old and the new county, it may be stated as a general rule that a change of county boundaries after land has been assessed for taxes, and before the organization of the new county, does not affect the lien of the tax on the land; and the tax collector of the old county has power to sell the land to enforce the lien, where the land falls into another county by reason of such change. This rule is applied whether a new county is formed out of the territory of the old, or whether some of the latter's territory is attached to another county: *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94; *Eskridge v. McGruder*, 45 Miss. 294; *Hilliard v. Griffin*, 72 Iowa, 331; *Austin v. Holt*, 32 Wis. 478. Thus township, school-district, and road-district taxes levied before the organization of the new county should be paid to and accounted for by the old county to the respective districts for which they were levied: *County of Clare v. Auditor-General*, 41 Mich. 182. Where, however, an unorganized county is attached to an organized one, and the proper officers of the organized county levy taxes upon the property in the unorganized county, and prior to the time such taxes become due the unorganized county becomes organized by the election and qualification of the proper officers, such taxes should be paid to the treasurer of the new county: *Morse v. County of Hitchcock*, 19 Neb. 566; *Fremont etc. R. R. Co. v. Brown Co.*, 18 Neb. 516.

A statute which gives to the inhabitants of a portion of a county already created the right to organize a new county does not, of itself, create a corporate existence from the date of the enactment. Under it, the new county, when properly organized, cannot maintain an action to recover the amounts paid in taxes by its inhabitants between the date of the act and the time when the organization was perfected: *Reeves County v. Pecos County*, 69 Tex. 177.

Under the Michigan statute, the auditor-general is bound to take notice of statutes changing county boundaries and creating new counties, and to know what land falls in one and what in the other; and where a county is divided, and a new one created from a portion of the old, he should apportion the state tax chargeable to the original county prior to division, upon the basis of the assessed value of the land in each for the year in which the last state equalization was made prior to such division, which will remain the standard until the next equalization: *Board of Supervisors v. Board of Supervisors*, 74 Mich. 721.

In the creation of new counties the tax-payers thereof are exonerated from the payment of any tax thereafter levied by the old county to pay any portion of its debt, unless the act creating the new county provides differently: *Comm'rs of Dare Co. v. Comm'rs of Currituck Co.*, 95 N. C. 189.

Where the organization of a new county is provided for by law, the acts of the officers of the old county throughout the territory designated for the new, done after the passage of the act, but before the actual organization of the new county, are valid: *Clark v. Goss*, 12 Tex. 395; 62 Am. Dec. 531. Until the new county is actually organized the territory remains, *prima facie* at least, subject to the jurisdiction of the old: *O'Shea v. Twohig*, 9 Tex. 336; *People v. McGuire*, 32 Cal. 140. After the county officers appointed by the governor for the new county qualify and enter upon the discharge of their duties, the unorganized county becomes fully organized: *Keating v. Marble*, 39 Kan. 370. In another case, it was decided that upon the holding of an election for county and precinct officers, pursuant to a call of county commissioners, appointed by the governor for the purpose of organizing the new county, and the canvassing of the votes cast at such election by such commissioners, such county is permanently organized: *Behr v. Willard*, 11 Neb. 601.

The division of the two counties is not complete until a court has been so far organized in the new county as to enable suits to be begun therein: *Buckinghouse v. Greeg*, 19 Ind. 401; and that the courts of the old county have jurisdiction after the creation of the new county, at least until the latter is completely organized: *People v. McGuire*, 32 Cal. 140. After the new county is fully organized, however, it has complete jurisdiction over its territory and the persons and property within it, in both civil and criminal cases: *Drake's Adm'r v. Vaughn*, 6 J. J. Marsh. 147.

As to the legal results of a change of county boundaries, or the erection of a new county out of the old, with respect to legal proceedings in the courts of the old or of the new county, and the respective jurisdiction of the old and new county generally, see the note to *Moss v. Shear*, 85 Am. Dec. 101-103.

On the organization of a new county, the county commissioners of either of the old counties who reside within its limits cease to be officers of the old county, unless they remove within it: *State v. Walker*, 17 Ohio, 135. Territory embraced by the county commissioners within the lines of a new county belongs thereto, until the old county in some proper proceeding asserts its right to have the line changed: *Speck v. State*, 7 Baxt. 46.

STATE v. CARSON.

[27 NEBRASKA, 501.]

EXEMPTIONS. — DEBTOR WHOSE PROPERTY HAS BEEN SEIZED UNDER ATTACHMENT, and advertised to be sold, is not thereby deprived of his right to claim the property as exempt at any time before sale, as provided by sections 521 and 552, Nebraska Civil Code.

EXEMPTIONS — TRANSFER OF PROPERTY NOT WAIVER. — A debtor whose property has been seized under attachment, and advertised to be sold, may, at any time before the sale, claim it as exempt from execution. The fact that he has transferred it to his wife, and testified, in an action by her to regain it, that it was hers absolutely, will not deprive him of the right of afterwards claiming it as exempt.

J. P. Maule and F. B. Donisthorpe, for the relator.

W. V. Fifield, J. D. Carson, and W. C. Sloan, for the respondent.

REESE, C. J. This is an application to this court, in the exercise of its original jurisdiction, for a peremptory writ of *mandamus* to respondent, who is the sheriff of Fillmore County, requiring him to appraise certain personal property which has been levied upon by him as the property of relator, in order that five hundred dollars' worth of said property may be set off to relator as exempt in lieu of a homestead, it being alleged that he has neither lands, town lots, nor houses subject to exemption.

It is alleged that certain judgments have been rendered against relator, and that, after the levy, he had filed an inventory in the court where the judgment was rendered and requested the appraisement of the property, but that respondent had refused to comply with the request, and was proceeding to sell the property to satisfy the judgment referred to.

By the answer of respondent it is admitted that he is the sheriff of Fillmore County, and that the relator is the head of a family, a resident of this state, and that he has neither lands, town lots, nor houses subject to exemption under the laws of this state; but it is alleged that the suits, when originally instituted against relator for the purpose of procuring judgment, were accompanied by orders of attachment which had been levied upon the property, and that subsequent to such levy the causes were heard in court, at which relator appeared, and that he made no objection to the levy upon the property by an effort to discharge the attachment or otherwise; that he consented to judgment being rendered against

him, and that he is now estopped to insist upon the exemption.

This contention is based principally upon the cases of *State v. Sanford*, 12 Neb. 425, and *State v. Krumpus*, 13 Neb. 321; but as the question here presented was pretty thoroughly examined and discussed in *Hamilton v. Fleming*, 26 Neb. 240, recently decided by this court, in which the rulings in the two former cases were substantially overruled, it is not deemed necessary to rediscuss the question here, except so far as to say that, as we understand section 522 of the Civil Code, it is provided that the person entitled to the exemption may avail himself of the benefits of section 521 by filing an inventory, "under oath, in the court where the judgment was obtained, or with the officer holding the execution of the whole of the personal property owned by him or them at any time before the sale of the property," and by so doing it becomes the duty of the officer to call the appraisers and set off to the party entitled thereto the property which is found to be exempt. It is further alleged in the answer that, subsequent to the levy upon the property by respondent, Jessie A. Stevens, the wife of relator, instituted an action in replevin in the district court of Fillmore County, and against the respondent, for the possession of the goods, she claiming to be the owner thereof by virtue of a bill of sale executed from the relator, her husband, to her, prior to that time; that the order of replevin was placed in the hands of the coroner of the county for service, and that, in accordance with the direction therein, he levied upon and took the property from the possession of respondent, causing the same to be appraised, as required in replevin cases; but that the plaintiff in the action failing to give the undertaking required by law, the property was returned to respondent, and the action proceeded as one for damages, under the provision of section 193 of the code; that the suit instituted by Mrs. Stevens had proceeded to trial in the district court to a jury, when a verdict was returned and judgment rendered in favor of respondent, the defendant in the action, and that a *supersedeas* bond had been filed by Mrs. Stevens, and the cause taken by proceedings in error to the supreme court; that upon the trial of that case relator was called as a witness and testified that he had no interest whatever in the property; that it all belonged to Mrs. Stevens, the plaintiff in that action. It is therefore now insisted that, having transferred the property to his wife, whether fraudulently or other-

wise, and declared that he had no interest in it, and said action being still pending, the title to the property being virtually undecided, he is now estopped to claim the property as exempt to him, and insist upon the appraisement thereof.

In support of this contention, a number of cases have been cited in the brief of respondent, all of which we have examined, but fail to find that they are in point. In Pennsylvania it has been held that a debtor who conceals his property, or otherwise attempts to delay or prevent the execution of the writ, forfeits the benefit of the exemption laws: *Strouse v. Becker*, 38 Pa. St. 190; 80 Am. Dec. 474; but it is said in Freeman on Executions, section 214 a, that the "rule does not seem to have had its foundation in any provision of the statutes of that state. It resulted from the belief of the judges that these statutes were designed for the exclusive benefit of honest debtors,—for those only who would not seek to avoid the operation of the writs directed against them. If, however, we concede that the dishonest are not worthy of the benefits of the exemption laws, it still seems that we should not, as judges, enforce our peculiar ideas until they have met the express approval of the legislature. Judges ought not to pronounce sentence where the law has provided no penalty. Besides, it must be remembered that one of the chief objects of these laws is to protect and provide for the debtor's family, and that this object would be partially subverted by making the benefit of the law depend upon the character of the debtor. Hence the position taken by the courts of Pennsylvania has been vigorously, and we think successfully, assailed, as will appear from the following quotation extracted from an opinion of the highest court in Mississippi (*Moseley v. Anderson*, 40 Miss. 49): 'This exemption is granted without any reference to the merit or demerit of the debtor. It is founded upon a policy that has no relation to the character or conduct of the parties claiming the benefit of it. It is the interest of the state that no citizen should be stripped of the implements necessary to enable him to carry on his usual employment, and that families should not be made paupers or beggars or deprived of shelter and reasonable comforts in consequence of the follies, the vices, or the crimes of their head. . . . The statute makes no such exceptions, and it is not for the court to ingraft them upon it.'

The author in the work before us, in further discussion of the subject, says: "The debtor's claim for exemption cannot

be successfully resisted on the ground that he has committed perjury in swearing to a false schedule, or has made a fraudulent mortgage, and has property in another county which has not been levied upon, or has other property which he fraudulently conceals for the purpose of hindering, delaying, and defrauding his creditors. Nor does an attempt by the debtor to prevent a levy, by disclaiming all interest in the property, and falsely representing it to belong to a third person, forfeit or estop him from enforcing his exemption rights. The reason for this rule has been thus stated: The conduct and statements of a party never operate as an estoppel in favor of another party, where the latter is not influenced thereby in his subsequent action, and to his prejudice. The fact that respondent disclaimed any ownership in the property himself at the time of the levy had no influence whatever on the officer who made it, for he made it notwithstanding the disclaimer, and afterwards sold the property. The failure of respondent to interpose his claim of exemption as to such property at the time of the levy could not work an estoppel against his making the claim subsequently, for it is neither found nor shown that the officer did or omitted to do anything by reason of such act of omission of respondent, or that the plaintiff in the execution was in any way prejudiced thereby. If a debtor conveys his property to delay or defraud creditors, he cannot sustain an action for it as exempt, because he has parted with the title, and cannot urge his own fraudulent design for the purpose of defeating his deed. If, however, the conveyance should be vacated for fraud, the exemption right would revive."

It appears from the answer that notwithstanding the relator had conveyed the property in question to his wife, and she brought an action against the sheriff for the conversion thereof, yet it was found upon the trial that the property in question did not belong to her, and the judgment was in favor of respondent. Whether this was upon the ground that the transfers by relator were fraudulent or without consideration, or for some other reason, is not clearly made to appear. However, it does appear that the verdict of the jury and the judgment of the court were that relator's wife was not the owner of the property. If this be true, then the property belonged to him, and he is entitled to his exemption. It is quite probable, also, that the fact of the conveyance to the wife would not divest the property of its exempt character, she being a member of

the family for whose benefit the exemption is declared by law. It is a well-established and settled doctrine of the courts, not only of this state, but of all others, so far as we are advised, that exemption laws should be liberally construed in favor of the debtor, the purpose being to prevent the wresting from him of the property which is set apart and used exclusively for the benefit of the family which is dependent upon him. This being the case, it would seem to make no difference as to the result of the action instituted against respondent by the wife of relator. Suppose we assume that in another trial it might be shown that the bill of sale from the husband to the wife was valid, and that the levy on the part of the officer was wrongful; her measure of damages would be the value of the property which he had sold. He would only be liable, therefore, for the surplus of the property after setting off to relator the property claimed by him as exempt. For the property returned, she could not recover. Or suppose that it should be ascertained upon such trial,—as it has in the previous one,—that the conveyance made by the husband to the wife did not transfer to her the title to the property, and that the title remained vested in him. In that case he would still be entitled to exemption, and the sale of the property by respondent, after the filing of the inventory which is alleged to have been filed by him, would be wrongful, and he would be liable therefor. So in any view of the case which we may take, we think the purpose of the statute would be subserved by a compliance on the part of defendant with the demand of relator.

The writ will therefore be allowed.

EXEMPTIONS, WHEN DEBTOR MAY CLAIM. — Personalty may be claimed as exempt at any time prior to the time of sale, when it is taken by virtue of an execution upon a general judgment against defendant: *Eltzroth v. Webster*, 15 Ind. 21; 77 Am. Dec. 78, and note; compare note to *Brown v. Leitch*, 31 Am. Rep. 44, 45; *Williamson v. Krumbhaar*, 132 Pa. St. 455.

EXEMPTIONS — TRANSFER OF EXEMPT PROPERTY. — Property exempt from sale under execution may be transferred or exchanged by the defendant in execution, even after the delivery of the execution to the officer: *Paxton v. Freeman*, 6 J. J. Marsh. 234; 22 Am. Dec. 74.

NEBRASKA LOAN AND TRUST COMPANY v. NINE.

[27 NEBRASKA, 507.]

TRADE NAME — INFRINGEMENT. — A loan and trust company cannot exclusively appropriate the state name and geographical word "Nebraska" as a trade name by incorporating under the name "Nebraska Loan and Trust Company," and enjoin others in the same business from using the same name, where there is no conflict of interest nor opportunity for the public to be deceived. The rules applicable to trademarks upon manufactured goods do not apply to such a case.

Angus McDonald, J. M. Ragan, and Lamb, Ricketts, and Wilson, for the appellant.

Houston and Baird, for the appellees.

REESE, C. J. This action was instituted in the district court of Lancaster County by the plaintiff, a corporation duly incorporated under the laws of this state, and doing business in the city of Hastings as the "Nebraska Loan and Trust Company," against the defendants, who, it is alleged, were proceeding to organize a company for the transaction of business similar to that transacted by plaintiff, and to be known by the same corporate name. It was alleged in the petition that plaintiff was incorporated in the year 1882 under the name of the "Nebraska Loan and Trust Company," and that it had continued in business up to the time of the commencement of the action, increasing its capital until it amounted to the sum of five hundred thousand dollars, all of which was paid in, and its business to about one million dollars annually; that its business was that of loaning money secured by first mortgages, dealing in municipal bonds, etc., and that such business had increased until, at the time of the commencement of the action, it had extended into a number of the counties of the state, by which its business had become very profitable and its capital stock valuable; and that by its long continuance in business, and the careful and prudent manner in which it had transacted such business as was intrusted to its care, as well as by an expensive system of advertising, it had extended its business as stated, and had built up a commercial reputation in the money centers of the East, as well as in the West, which was of great value; that the name "Nebraska Loan and Trust Company" had become its trade name, by which its responsibility and business reputation was known by its customers and the public, and by which the name had become of great importance and value to it; that

defendants, well knowing these facts, with the design and purpose of getting the benefit of plaintiff's reputation, were forming themselves into an association, or copartnership, and had commenced to advertise to do the business of negotiating loans secured by mortgages, buying and selling city, county, and other municipal bonds and evidences of debt, and had assumed the same corporate name of plaintiff, to wit, "Nebraska Loan and Trust Company," and that they were seeking to carry on said business under that name, and no other; that while their principal place of business was in the city of Lincoln, yet they were attempting to carry on and were advertising to do said business under said name in the same territory occupied by plaintiff; thereby defendants were wrongfully using the trade name of plaintiff, to the great injury and damage of plaintiff, and defrauding and injuring those of plaintiff's customers who might, by the fraudulent representations of defendants, be induced to give their patronage and business to them; that defendants had no capital nor credit, were without experience in the business referred to, and were wholly dependent upon the credit and reputation of plaintiff for their ability to build up a business and reputation, and by drawing from plaintiff's business, secure to themselves a share of its profits and emoluments. An injunction was prayed for, together with a demand for general relief. A temporary injunction was allowed. Defendant Houston answered, denying any interest in the alleged new corporation, and alleging that his only connection with the other defendants was, that he had been consulted by them as an attorney, and had given such advice as was needed by them from time to time, and had been requested to act as legal adviser of the new corporation or company. Nine and Austin answered by a general denial.

A trial was had to the district court, which resulted in a dissolution of the temporary injunction and a general finding and decree in favor of defendant. From this decree plaintiff appeals.

The evidence introduced upon the trial, in so far as it explained the purposes of the organization of plaintiff and the extent to which its business has been carried, the amount thereof transacted by it, and the capital invested, fully sustained the allegations of the petition; while that with reference to the business capacity and capital of defendants leaves some doubt in the mind as to their real purpose in the organi-

zation of the company or corporation by them. But as we understand the case before us, there is but one question involved, and that is, whether or not the name assumed by plaintiff, to wit, "Nebraska Loan and Trust Company," is one which they can appropriate to themselves, to the exclusion of all other persons within the state, and thereby render it unlawful for such person to enter into any business engagements of the kind under that name.

The words "loan and trust" are simply indicative of the character of the business which they propose to carry on, and so far as they are concerned there can be no question but that there can be no special property or right in them. So the real and only question involved is, whether or not a loan and trust company organized in any part of the state can appropriate the name of the state to its own exclusive use, building up thereby a trade name which will be protected, and to which such company will have the exclusive right, the word "Nebraska" being a geographical name. We are of the opinion that such cannot be done. In the discussion of this question we are not unmindful of the injury which can be inflicted upon plaintiff or the harm which might be done to the public by a new corporation, without financial means, organizing under the same name. That question, however, is not before us; the question simply is, whether or not the name assumed by plaintiff can be protected in equity as the exclusive property of plaintiff, and defendants enjoined from assuming the same name a hundred miles distant. The right of property in trade-marks in some cases is not to be questioned; but we know of no case which goes so far as to allow a company of persons to assume a corporate name for the transaction of the business which can be and is transacted in all parts of the state, — one as well as another, — and appropriate the name of the state, to the exclusion of all others in all parts thereof, and thus secure a property right therein.

Suppose a bank should be organized in the state as the State Bank of Nebraska, and as such should extend its business until it became ever so strong a factor in the finances of the state; yet it could scarcely claim the right to thus appropriate the name of the state, to the exclusion of all other banks therein. As a general rule, geographical names are not the subject of property as a trade name. It is true there are exceptions, among which is *Newby v. Oregon Central R. R. Co.*, Deady, 609. In that case, while the name assumed by the

original Oregon Central Railroad Company contains the name of the state, yet by the addition of the word "Central" the location of the road was thereby indicated, and the geographical character of the name was avoided. It would seem also that the argument in favor of the right would apply with much greater force in the case of a railroad company than in the ordinary commercial transactions of the kind referred to in the plaintiff's petition. In the former case it might be presumed that the lines of the road would traverse the whole state, and that they would necessarily cross each other; the cars being of uniform manufacture and color, when designated with the same initial letters, would be quite difficult of identification; and many other reasons could suggest themselves to the mind in favor of applying the rule stated. But these conditions cannot be applied to the case at bar. The business is carried on mainly by correspondence, and, as we have said, the offices are near one hundred miles distant from each other, — one in Hastings, the other in Lincoln. There could be but little, if any, danger of confusion through the mails by the wrong delivery of mail matter. The letters sent out by either party would designate the office from which they came. Again, it cannot be that the same reason for the rule exists in cases of this kind as in cases of trade-marks. In trade-mark cases there is a commodity manufactured or in some way prepared for the general market. In such cases it is due both to the public and to the first manufacturer that, if he furnish a superior quality of goods or wares, the former be protected from fraudulent imitations, the latter from the destruction of a trade he has built up at great expense and labor, and by honesty in his manufactures. The products of the new enterprise should stand upon their own merits in their race for favor in the markets to which they are sent.

In *Congress and Empire Spring Co. v. High Rock Spring Co.*, 45 N. Y. 291, 6 Am. Rep. 82, an injunction was granted against the defendant from bottling and placing upon the market a water with a name similar to that of the water bottled and sold by the plaintiff. The plaintiff was the owner of what was denominated the "Congress Spring" property in Saratoga, and for a number of years it had been engaged in bottling and selling "Congress Water." The defendant was organized as "The High Rock Congress Spring Company," and was engaged in bottling and selling "High Rock Congress Spring Water," and so labeling its products. An injunction

was allowed for the reason that the word "Congress," from long use by the plaintiff, became its legitimate property as a trade-mark and as indicating the origin and ownership of the water flowing from the Congress spring. *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589, was to restrain the defendant from the appropriation of a trade-mark upon the label of manufactured cigars, and an injunction was allowed. *Pierce v. Guittard*, 68 Cal. 68, 58 Am. Rep. 1, was to restrain an infringement upon a trade-mark used for manufactured chocolate, and the same principles were held to apply. The rule applied to the above cases runs through the line of cases where the manufactured or prepared product is placed upon the open market in competition with other articles of the same character or kind. But we think it does not apply to the case at bar. In this case a different principle is involved. The damages, if any, inflicted upon the public could not be by the devices referred to. The place of business of defendant being so remote from plaintiff would seem to preclude the idea of such damage resulting to plaintiff, considering the character of the business in which the parties desire to engage. The nature of the business transacted by the companies is such that, considering the distance between their principal offices, there can be no substantial conflict of interest. Before plaintiff can enjoin defendants, this conflict would have to be shown, and that the establishment of the new company in business in Lincoln would be to practice a deception upon those who used ordinary care in the conduct of their business transactions: *Cox's Manual of Trade-mark Cases*, Nos. 618, 619, 236, 237; *Delaware Canal Co. v. Clark*, 13 Wall. 311.

The decree of the district court is affirmed.

TRADE NAME, INFRINGEMENT OF. — As a general rule, geographical names cannot be appropriated and used as trade-marks or trade names; and one using such a name in his business or trade cannot prevent others from using it in the same manner: *Note to Partridge v. Menck*, 47 Am. Dec. 291, 292.

CRESSLER v. REES.

[27 NEBRASKA, 515.]

VENDOR AND VENDEE—EVIDENCE OF FALSE REPRESENTATIONS OF VALUE BY VENDOR. — In an action to recover the possession of personal property, exchanged for real estate in another state, with which the vendor was acquainted and of which the vendee knew nothing, the evidence of the vendee is admissible, that the vendor represented the land to be worth double its real value, and that, relying upon such representations, as well as others as to the quality of the land, he was induced to make the trade; and the vendee cannot be compelled, on cross-examination, to testify as to whether or not he was dealing in land in both states at the time, when it is conceded that he knew nothing of the land in dispute, or of the value of land in that neighborhood.

VENDOR AND VENDEE—MISREPRESENTATIONS AS TO QUALITY AND TITLE AS GROUND FOR RESCISSION. — Misrepresentation of material facts regarding the quality and title to land, made by the vendor, and relied upon by the vendee as true, is sufficient ground for rescission of the sale.

VENDOR AND VENDEE—MISREPRESENTATIONS, WHEN QUESTION OF FACT. — Where the evidence is conflicting as to whether or not the vendee in purchasing relied upon the truth of misrepresentations of material facts made by the vendor as to the value and quality of the land, the question is one of fact, to be determined by the jury.

H. C. Brome and Burt Mapes, for the plaintiff in error.

Wigton and Whitham, for the defendant in error.

REESE, C. J. This was an action in replevin, instituted in the district court of Madison County, for the possession of a stock of furniture kept in a store in the city of Norfolk. A jury trial was had, which resulted in a verdict in favor of defendant in error, and upon which a judgment was rendered, for the reversal of which plaintiff brings the case to this court by proceedings in error.

It appears that defendant in error was the owner of the stock of goods referred to, and doing business in the city of Norfolk, and that he made a trade with plaintiff in error by which the stock of furniture was traded for real estate in Davis County, Iowa, and on which plaintiff in error had paid defendant in error the sum of about \$440.

Subsequent to this trade, defendant in error seems to have become satisfied that plaintiff in error had practiced a fraud upon him in his representations as to the quality of the land in Davis County. He therefore tendered back the money and claimed to rescind the contract, and brought this action for the possession of the stock of furniture.

The errors alleged will be noticed in the order in which they

are presented. First, it is insisted that the court erred in admitting evidence as to Cressler's representation as to the value of the Davis County farm. It is shown by the evidence that plaintiff in error had been upon the land, had seen it and knew what it was, and what its value was. And it is testified by defendant in error that plaintiff in error represented to him, or told him, that it was worth three thousand dollars. It is claimed by plaintiff in error, in his evidence, that he made no representations as to the value of the property whatever. It also appears that defendant in error had not seen the farm, and knew nothing as to its quality. This part of the conversation, though, as testified to by defendant in error, is not to our mind a very essential element in the case; but there were other representations testified to by him which, if believed by the jury, would be sufficient to avoid the contract.

In *Morgan v. Dinges*, 23 Neb. 273, 8 Am. St. Rep. 121, it is said by Judge Maxwell, in writing the opinion: "Where parties stand on an equal footing, expressions of opinion as to the value of certain property will not usually be considered so material that misstatements will constitute fraud. But where the purchaser resides near the property in this state, and has full knowledge of its situation and approximate value, and the owner resides in another state, without any knowledge on that subject, expressions of opinion as to value by such purchaser which he knows to be much beneath the true value of the property, and statements made by him that the owner's title had been abrogated by reason of a sale of the property for taxes, will be sufficient, where the property was purchased for a grossly inadequate consideration, to set aside the deed."

It would seem, therefore, to follow logically that if plaintiff in error knew of the quality of the land, and also knew that the defendant in error knew nothing of it, which is shown by the evidence, a representation by him that the property was worth very much more than he knew it to be at the time the representations were made is equally fraudulent. The court did err in this ruling.

Upon the trial defendant in error testified, in substance, that plaintiff in error represented to him that the farm referred to "was a good farm of ninety-four acres, sixty acres of it under cultivation, all of it under fence; the rest of it was timber and pasture land; a good house, insured for six hundred dollars, and about a mile from the nice little town of Floris,

which had six hundred inhabitants, and that the farm was worth three thousand dollars." He also testified that he relied upon the representations made, and would not have made the exchange had it not been for them.

The depositions of other witnesses who resided near the property were read upon the trial, showing that such representations, if made, were untrue. It is now insisted that the court erred in permitting defendant in error to testify that the representations made by Cressler induced him to make the trade; that this was testifying to a conclusion which it was the province of the jury to determine, the witness stating the facts. We cannot agree to this conclusion; it was entirely competent for the witness to state whether he believed the representation alleged to have been made, and whether or not they were the moving cause of the transfer.

During the cross-examination of defendant in error he was asked whether or not he had been in the habit of trading and dealing in real estate in Iowa and in this state. To this question objection was made, which was sustained. The ruling of the court upon this subject is now assigned for error. It seems to be conceded that the defendant in error knew nothing of the real estate in question. Neither did he know anything of the values of real estate in the neighborhood where the farm was located. The fact, then, if true, could have had no bearing upon the case at bar. The decision of the court in excluding the offered evidence was correct, but had it been otherwise, there could have been no prejudice to plaintiff in error.

In connection with the alleged misrepresentation of the quality of the land, it was insisted upon the trial that there was a misrepresentation as to the title, two of the grantors in the chain of title having been infants at the time of the execution of the deed by them, and not having yet attained their majority. Upon the request of defendant in error, the court gave to the jury the following instruction, numbered 3: "If you find from the testimony that in order to induce the plaintiff to make the sale of the stock of goods replevied in this action with other property for defendant's real estate in Iowa, defendant made to plaintiff misrepresentations, by either word, act, or suppression of material facts, known to defendant, of matters affecting the condition, quality, character, value, or title of the defendant's real estate in Davis County, Iowa, in any material respect, for which plaintiff

would have suffered loss had such sale been completed, and not rescinded, and that plaintiff relied on such statements and representations as true, and that by reason of said misrepresentations, plaintiff was induced to make such sale, and that plaintiff, soon after the discovery of such misrepresentations, rescinded the sale and tendered to defendant the money paid by defendant on such sale, then your verdict will be for plaintiff."

The giving of this instruction was excepted to by plaintiff, and is now assigned for error. Plaintiff in error had furnished to defendant in error an abstract of the title, showing the different conveyances from the government of the United States down to plaintiff in error. But the abstract did not show, nor was the defendant in error informed of, any disability existing at the time of the conveyance by any of the grantors, the fact of the disability being shown by the deposition of the parties themselves. Taking this instruction as a whole, and in connection with his other instructions, which were given by the court upon its own motion, we think there was no error in giving it.

It is next contended that the verdict of the jury was not sustained by sufficient evidence. The evidence upon that part of the case which refers to the representations made by plaintiff in error to defendant in error prior to the trade was conflicting, defendant testifying to the representations in detail, while plaintiff in error testified that he made no such representations at all. In addition to the representations hereinbefore given from the testimony of defendant in error, he testified that plaintiff in error stated to him that the farm was, to a great extent, bottom land, and that it never overflowed; while it was shown by other witnesses on the part of defendant in error that the bottom land did overflow quite frequently, so much so as to render it of but little value for farming. It was also shown by the depositions of witnesses taken in Davis County, Iowa, that the land was of much less value than that represented by plaintiff in error; according to the testimony of defendant in error, many of them putting it at less than one third. This question of fact was solely for the jury; and if they believed the testimony of defendant in error, and disbelieved that of plaintiff in error, their verdict could not have been otherwise than what it was.

At the time of the seizure of the property by the sheriff under his writ of replevin in this case, a considerable portion

of the property was not found by him, and was therefore not returned to defendant in error. The value of this property was found by the jury to be \$797, which was in accordance with the evidence in the case.

The ninth instruction given to the jury by the court on its own motion was as follows: "If you find from the evidence that the plaintiff, at the commencement of the action, was the owner of the property in controversy, and entitled to the possession of the same, you will award him such damages as the testimony has shown him entitled to, if any, for the wrongful detention of such property, together with the value of such portions of the property as shown by the testimony, if any, you find was retained by defendant, and not delivered to the plaintiff under the writ of replevin in this case."

The giving of this instruction is now assigned for error. The objection is based upon the contention that defendant in error was not entitled to recover at all, and upon the further contention that defendant in error already had \$464 of plaintiff's money, which should have been credited upon the amount found due by the jury.

Upon this part of the case, the evidence shows beyond question the tender of this money by defendant in error to plaintiff in error prior to the commencement of the action. But it is not shown that the tender was kept good, or that the money was paid into court for him. Had it been shown that the tender was kept good, and that the money was at all times subject to his command, no objection could have been made to the judgment, and this contention of plaintiff in error would not avail.

Defendant in error, while upon the witness-stand, was asked what he did with the money which he tendered to plaintiff in error; his answer was, that he put it in his pocket; and for aught that appears from the records, it is there yet, and hence not subject to the control of plaintiff in error.

The judgment of the district court will therefore be reversed, unless defendant in error, within forty days from the filing of this opinion, remit from the judgment \$464. If such *re-mittitur* is filed, the judgment of the district court will be affirmed.

Judgment accordingly. _____

VENDOR AND VENDEE — FALSE REPRESENTATIONS ON PART OF THE VENDOR. — As to the effect of false representations on the part of a vendor, who induces the vendee to act thereupon, see note to *Coltrill v. Krum*.

18 Am. St. Rep. 556-558; *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345, and note 350, 351. As to the vendee's right to rescind the contract of sale for misrepresentations on the part of the vendor, see *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178; *Ellsworth v. Randall*, 78 Iowa, 141; 16 Am. St. Rep. 425, and note.

WITNESSES — VALUE OF LAND. — As to when a witness is incompetent to testify as to the value of land, see *Flint v. Flint*, 6 Allen, 34; 83 Am. Dec. 615, and note; *Fairley v. Smith*, 87 N. C. 367; 42 Am. Rep. 522; note to *Currie v. Waverly etc. R. R. Co.*, 19 Am. St. Rep. 460.

STATE INSURANCE COMPANY v. SCHRECK.

[27 NEBRASKA, 527.]

INSURANCE — ENTIRETY OF CONTRACT — FORFEITURE AS TO PART. — A fire insurance policy for which a gross premium is paid, and which covers real estate and various classes of personal property, the latter not specifically named, is not entire, and although a mortgage is given on the real estate in violation of a condition in the policy, this will not bar a recovery for the loss of the personal property; nor will mortgages on the latter, executed subsequent to the issuance of the policy, prevent a recovery for the loss, if they were paid and canceled prior to the destruction of the property.

INSURANCE — EVIDENCE, OBJECTIONS TO. — In an action upon an insurance policy to recover for the loss of personal property, where payment is resisted on the ground that the property was mortgaged subsequently to the issuance of the policy and in violation of the conditions thereof, and the insurer himself proves that such mortgages were paid and canceled prior to the loss, and the jury so find, he cannot afterwards object that the evidence was insufficient to support the finding, nor that it was incompetent or immaterial under the issue joined.

INSURANCE — PROOF OF NOTICE OF LOSS. — Under a policy of fire insurance not requiring notice of loss to be written or given to any particular person, uncontradicted evidence that two of the company's agents were at the fire, that they received and agreed to give notice of the loss to the company, and that soon thereafter the company's adjuster came and adjusted the loss, is sufficient proof of notice of loss, and of the agency of the parties mentioned as agents and adjuster.

INSURANCE — DESCRIPTION OF PROPERTY — VARIANCE. — Where the insured property is situated on the northwest quarter of a certain section of land, instead of the northeast quarter thereof, as described in the policy, the variance is not material, and the insured is not compelled, in case of loss, to seek a reformation of the policy in equity, before he can recover in a court of law.

E. W. Adams, J. J. King, M. F. Harrington, and Cummins and Wright, for the plaintiff in error.

Rice Brothers, for the defendant in error.

REESE, C. J. This action was instituted in the district court of Holt County for the purpose of recovering upon an

insurance policy the value of certain property which had been insured and destroyed by fire. The petition was in the usual form. A number of defenses were presented by the answer, some of which will be noticed in the order in which they are presented by counsel in arguments and briefs.

By the policy of insurance it is provided that "in consideration that John Schreck, of Stuart, Nebraska, having made his note or obligation to the State Insurance Company for one hundred dollars, agreeing to pay the same according to the terms thereof, for insurance against loss or damage by fire, lightning, wind-storms, cyclones, and tornadoes, to the amount of two thousand five hundred dollars on the property hereinafter described, namely:—

On his dwelling-house (value of house, \$300)	\$200
On beds and bedding while therein	50
On wearing apparel while therein	100
On household furniture while therein	150
On sewing-machine while therein	25
On hog-house	50
On frame barn (value of barn, \$75)	50
On harness on farm	75
On wagons and carriages on premises (\$250)	190
On farming utensils on premises, other than mowing and reaping machines (\$75)	60
On mowing-machine on premises (\$85)	40
On hen-house	50
On grain in buildings or in stack on premises, and against fire and lightning in buildings or in stack on plowed land on premises (except flax)	300
On frame granary (value, \$125)	100
On carriage-house	50
On work-horses or mules (not to exceed \$100 on each) in barns, or on farm herein described, and against lightning and tornadoes while at large or in use (\$500)	400
On cattle therein, and against lightning and tornadoes while at large, not to exceed \$25 on any one animal (\$660)	490
On hogs therein or at large, not to exceed \$8 on a hog (\$200)	120

"All situated and being on the northeast quarter of section 2, township 30, range 16, county of Holt, state of Nebraska.

"Term, five years; total amount insured, \$2,500: premium, \$100."

Among the defenses presented by the answer was one that defendant in error had by mortgages encumbered the property insured in violation of the condition of the policy. This condition was as follows: "Any other insurance or any encumbrance upon any of the property hereby insured existing at the date of this policy not made known in the application, or if any subsequent encumbrance is imposed, or title or occupancy changed or hazard increased without the written consent of the secretary of the company, or if the building becomes vacant, this policy shall be void. Any false statement in the application shall make this policy void. Every renewal of this policy will be governed and subject to all the provisions of the original application and policy."

The buildings referred to in the policy were destroyed by fire, together with a large amount of the personal property. Subsequent to the execution of the policy defendant in error had executed a mortgage upon his real estate, in violation of the terms of the policy, and upon the trial this part of the case was virtually abandoned by him; the jury allowed nothing for the buildings. The general verdict was in favor of defendant in error for the sum of \$998.95, the value of the personal property destroyed.

Upon the trial the court instructed the jury that if they found from the evidence that defendant in error had mortgaged the land on which the barn, granary, and hog-house destroyed were situated, without the knowledge and consent of the plaintiff in error, he could not recover such loss, and that if he had executed any mortgages upon the personal property insured by the policy, during its existence, without the knowledge and consent of plaintiff in error, and the mortgages were not proven to have been paid at the time the loss occurred, the policy would be void as to such property, and plaintiff could not recover anything thereon; but that if at the time of the destruction of the property the mortgages had been paid, so that the property was not encumbered, the fact of their prior execution would not prevent the recovery. It is now contended by plaintiff in error that the policy was an entire contract, and that it prohibited the placing of any encumbrance upon any of the property, and provided that if such encumbrance was created the mortgage would be void, and therefore the defendant in error would not be entitled to recover anything, having violated this provision. It is contended on the part of defendant in error that while the specific

buildings referred to in the policy were insured, and that the execution of the mortgage upon the real estate had the effect of avoiding the policy so far as the buildings were concerned, yet there was no specific personal property insured; that the risk being upon a particular kind of property instead of specific articles, to a certain amount, the fact that the property had been mortgaged or sold prior to the fire would make no difference if there was property of the kind and quality described in the policy, which was destroyed, and to which the defendant in error had a good title.

The briefs presented by counsel upon either side are quite elaborate, and show a commendable research and investigation as to the proper rules to be applied in cases of this kind, and a large number of cases and text-books are cited by both parties, which to a considerable extent sustain the views entertained by them. That there is a wide conflict of authority upon this question cannot be disputed; and as it is now before the court for the first time, it becomes necessary for us to dispose of it upon principle, and in such a way as to us may seem most consistent with the rules of justice. It would be impossible for us, without extending this opinion to a much greater length than would be desirable, to review all the cases and authorities cited and presented by counsel, and therefore we trust we may be excused from entering upon such an undertaking.

It appears from an examination of the policy that the premium paid was a gross sum, to wit, one hundred dollars. The amount of the insurance was two thousand five hundred dollars, or at least was limited to that sum, and to this extent the contract may be said to have been an entirety; but as to the property insured, a different course seems to have been pursued by the parties to the contract, and to this extent the contract is severable. And it may also be observed that there is nothing necessarily in the character or quality of the insured property which would seem to make the insurance of one depend upon the insurance of the other. There is nothing, either in reason or law, which would prevent the insurance of the buildings upon the real estate without the insurance of the personal property upon the farm, the value of which is involved in this action; and also the wagon, farming utensils, mowing-machine, carriages, live-stock, and grain might have been as well insured without an insurance upon the building as with; also, we think it is fair to say that, according to the language of the policy, it

appears to be a species of separate insurance upon the personal property. We apprehend there can be no doubt but had there been no encumbrance upon any of the property, but a portion thereof had been destroyed by fire, an action could have been maintained for the damage sustained by the destruction of that particular portion, but not exceeding the amount of insurance placed upon that particular kind of property. So far as the execution of the real estate mortgage is concerned, we do not think it should be held to affect the rights of defendant in error in his action for the loss occasioned by the destruction of the personal property.

In *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 463, 29 Am. Rep. 184, a case quite similar to this in its facts, it is said by Folger, J., in writing the opinion: "It is plain, from the fact of a separate valuation having been put by the parties upon the different subjects of the insurance, that they looked upon them as distinct matters of contract. The effect of the separate valuation was to make them so. No matter how much value there might have been in any one of these subjects, even to the whole amount of the policy, had it been totally destroyed the defendant could not have been made liable to an amount greater than that named in the policy as the valuation of it. Thus it was, at the inception of the contract, distinguished from the other subjects of insurance, and the contract so made as to be capable of application to it alone."

The holdings in that case, and others of a like character cited by defendant in error, seem to us to be more in accord with the principles of common justice than those holding to the doctrine that the execution of a mortgage upon the real estate would not only prevent the assured from recovering the value of the real property destroyed, but would also reach the whole contract and contaminate it with the vice. As said in *Phoenix Ins. Co. v. Barnd*, 16 Neb. 90: "A contract for insurance must receive a reasonable construction. The insurer receives the premium as a consideration to pay for loss of property by fire, to a certain amount should such loss occur. Such a contract is to be sustained, if possible to do so. The insurer retains the consideration for the contract, and should be required to perform on its part, and no merely technical objection not materially affecting the risk is available as a defense."

Now, it cannot be contended that the fact of mortgaging the real estate would in any degree affect the risk so far as the personal property was concerned. It did not affect the title

in the assured, neither did it cause the property to be any more liable to be destroyed by fire; and it seems to us that the most common principles of justice and fair dealing are in the line of the large number of authorities cited by defendant in error holding that the contract of insurance on personal property would not be avoided by the execution of such mortgage. In the case of *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 463, 29 Am. Rep. 184, the opinion is quite exhaustive, and consists of a careful review of a great number of the authorities presented by the counsel for the insurance company, and a discussion of the whole question upon principle. It can serve no good purpose to further quote from it here. We are satisfied with its logic and its reasoning, and believe that it states the true doctrine applicable to cases of this kind.

It was shown by defendant in error, upon the witness-stand, on cross-examination, that some of the personal property which had been destroyed had at some time or other subsequent to the execution of the policy been mortgaged, but that at the time of the fire the mortgages had all been paid and there was no encumbrance upon the property. It is now contended by plaintiff in error that the fact of the execution of the mortgage referred to avoided the policy as to the personal property.

The term of the policy was five years from the date of its execution, which was the eighth day of September, 1884. An examination of the language hereinbefore copied satisfies us that it was not the intention of the parties to the contract to require that the same personal property should remain upon the farm for the whole term of the policy, but that, as hereinbefore indicated, it was upon certain kinds of property upon the premises. The second item in the list given is, "On beds and bedding while therein, \$50"; the third, "On wearing apparel while therein, \$100."

It cannot be contended that it was the purpose of the parties to the contract that the same beds and bedding and wearing apparel should necessarily remain in that building for five years to secure the benefit of the insurance, but rather that beds and bedding and wearing apparel while in the building, without reference to any particular kind or quality, should receive the benefit of the insurance. The same may be said as to the household furniture, the sewing-machine, the hay in the buildings or stack, the harness on the farm, wagon, farming utensils, and live-stock. The clear intent and purpose of the parties was, that such as might be worn out and destroyed

might be replaced; that such as it might become necessary to sell might be sold and other stock purchased in its stead. The execution of a chattel mortgage is a sale subject to the conditions named in the mortgage. The legal title is vested in the mortgagee, and it is his property, subject alone to the conditions contained in the mortgage. Had the property destroyed been sold, and the legal title transferred to the purchaser, defendant in error could recover nothing for his loss. Had it been mortgaged and the legal title so transferred, he could still recover nothing. But under the plain sense of the policy, had the property been replaced by other of the same kind and species, there could be no doubt of plaintiff's liability in case of loss. Had the contract of insurance been upon specific personal property, it is possible that the defense presented would have been available. However, that question is not before us. But we are quite clear that the transfer of the legal title to the insured property, either by mortgage or sale, would avoid the policy so far only as that particular property was concerned, during the time of the existence of the title in the purchaser or mortgagee, and to that extent only could the sale or mortgaging of the property under the provisions of this policy be a successful defense.

But it is claimed that there was no competent proof that the mortgages were paid and the title of the property in the assured at the time of the fire, and that that burden was upon defendant in error. Upon an examination of the bill of exceptions we find that while defendant was upon the witness-stand, after having testified to the loss, and during the cross-examination, he was interrogated by counsel for plaintiff in error as to his having executed the mortgages referred to, and in many instances his answers were, that he had so executed the mortgages, but that they had been paid. In others he was not certain as to whether the mortgages covered the property lost or not. In view of this evidence, the question was submitted specially to the jury as to the execution of the mortgages and the payment thereof, and they found as returned, that the mortgages had been executed, but that they had been canceled and paid at the time of the loss. Now, had the plaintiff in error only proven the execution of the mortgages, it would perhaps have devolved upon defendant in error to have shown that at the time of the loss the title to the property destroyed was not impaired. But that course was not pursued. They inquired of him particularly whether or

not the mortgages had been canceled by payment, and his answer was that they had. They cannot now object to this evidence as failing to establish the fact. In this connection it is contended that, under the issues presented by the pleadings, evidence of payment or release was immaterial, and therefore improperly submitted to the jury. This contention cannot be successfully urged here, for the reason, as we have said, that even over the objection of counsel for defendant in error, plaintiff in error, upon the cross-examination of defendant, insisted upon making this very proof. And he cannot now be heard to object that it was not within the legal form presented by the pleadings. This contention is also unavailing.

The next contention of plaintiff in error is, that there was no proof of loss prior to the commencement of the action. The provisions of the policy upon this subject are as follows: "In case of loss, the assured shall notify the company within thirty days from the time such loss may have occurred." There seems to be no provision requiring proof of loss, as is contained in some policies which have been before us; the provision seems to be that the company shall have notice of the fact. Nor is it stipulated that the notice shall be given to any particular person or officer; neither is there any requirement that the notice given shall be in writing. Upon this subject defendant in error testified that at the time of the fire two of the agents of plaintiff in error were present and saw the destruction of the property; that they then informed him that they would notify the company of his loss, and that a short time thereafter the adjuster for the company came to the residence of defendant in error and adjusted the loss. It is now insisted that there was no competent proof of the agency of the two persons who were present, or of the person who represented himself as the adjuster for plaintiff in error.

Upon this subject defendant in error testifies positively to the fact of the agency. He was not cross-examined, and therefore not interrogated by any one as to his knowledge of the fact testified to by him. It may have been, and probably was, true that he had personal knowledge of the fact of the agency of the two persons referred to, and of the adjuster. At least we must assume the fact to be so in the absence of anything showing the contrary, as there is no presumption that he testified falsely, or upon a subject of which he knew nothing. It is possible that had counsel for plaintiff in error interrogated him as to his knowledge of that fact, they might have suc-

ceeded in showing that he in reality knew nothing about their agency. But this was not done, and the testimony upon that subject must be taken as true. He does not show that the parties represented themselves to him to be such agents, or that such representations were made by any person, but he testifies positively to the fact of the agency.

The next and last contention of the plaintiff in error is, that there is a material and fatal variance between the description of the premises as described in the petition and the proof. In the policy the property is described as all being situated upon the northeast quarter of section 2, township 30, range 16, and it is so described in the petition. It is shown in the proof that the correct description of the property would have been the northwest quarter of section 2, and of the same township and range. This seems to have been a mistake on the part of the agent or of the assured, or perhaps of both, at the time of the execution of the policy.

It is contended by plaintiff in error that before defendant could recover he should have instituted his action in equity to reform the policy, and that having failed to do so, he cannot recover. To this we cannot agree. It was shown upon the trial that at the time of the execution of the policy the agent went to the house of defendant in error, examined all the property, and effected the insurance; that during the time intervening between the execution of the policy and the trial, defendant in error had continually resided upon the premises upon which he then resided, and where the insurance was effected, and that the personal property had been there during the whole of the time.

In May on Insurance, 872, section 566, it is said: "In most of the states, however, courts of law will apply the doctrines of waiver and estoppel, or allow proof of their mistakes, so as to enable the plaintiff to maintain his action for indemnity, and not drive him into a court of equity."

This question was before the supreme court of Kansas in *American Central Ins. Co. v. McLanathan*, 11 Kan. 533. In that case the court says: "In such a case the contract is not void for uncertainty, nor is there any need of applying for a reformation of the contract, provided it appear, either from the face of the instrument or extrinsic facts, which is the true and which is the false description"; citing 1 Greenl. Ev., secs. 300, 302; *Loomis v. Jackson*, 19 Johns. 449; 2 Hill on Real Property, 358, 368; *Boardman v. Lessees of Reed*, 6

Pet. 340. See also *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; 98 Am. Dec. 332.

We find no error requiring a reversal of the judgment. It is therefore affirmed.

INSURANCE CONTRACT, ENTIRETY OF. — As to when a contract of insurance covering several items of property is divisible and when entire, see *Loomis v. Rockford Ins. Co.*, 77 Wis. 87; *ante*, p. 96, and note 101, 102.

STEELE v. COON.

[27 NEBRASKA, 586.]

FRAUDULENT CONVEYANCES. — DEED NOT FRAUDULENT AT FIRST may become so afterwards by being concealed, or not pursued, the grantor remaining in possession, by which means creditors have been drawn in to lend their money.

FRAUDULENT CONVEYANCES. — DEED EXECUTED BY ONE FREE OF DEBT, but concealed and not recorded, is fraudulent and void as to subsequent creditors of the grantor.

HUSBAND AND WIFE. — CONVEYANCES BETWEEN husband and wife, by the aid of a third person, will be closely scrutinized, but are not necessarily fraudulent as to creditors, and may be deemed valid to the extent of the consideration passing, which will not include the value of a homestead conveyed as part of the transaction, and the remainder, to vest in the heirs of the holder of the general title thereto, will not be considered as adding to such consideration.

S. H. Steele, R. S. Norval, and J. W. McLoud, for the appellants.

J. C. Robberts and A. J. Evans, for the appellees.

COBB, J. This cause was appealed from the judgment of the district court of Butler County by the First National Bank of Seward, Samuel H. Steele, and David Belsley, who exhibited their creditors' bills in the court below, against Archibald F. Coon and Rebecca, his wife, Frank R. Coon, a minor, and J. G. Ross, setting up that on August 22, 1884, Archibald F. Coon was the owner of the southwest quarter of section 30, township 15 north, range 3 east, of the sixth principal meridian, of record, in his name, in said county; that with William H. Westover and J. Robert Williams he executed his promissory note to said bank for \$1,500, due October 22, 1884, with ten per cent interest; that credit for said loan was given them on the faith of said Coon being the owner of said real property; that on November 17, 1885, said bank recovered judgment on said note against the makers, in the

district court of Seward County, Nebraska, for the sum of \$1,660 and \$9.53 costs, with interest thereon at ten per cent per annum from the date of judgment, which remains unpaid; that on June 29, 1886, a transcript of said judgment was filed in the district court of Butler County, and execution was issued against said Coon which was duly served and returned *nulla bona*, but was levied upon said land; that on June 24, 1878, the government of the United States patented said land to said Coon; that on October 13, 1881, said Coon and his wife, Rebecca, without consideration, and with intent to defraud the First National Bank of Seward and other creditors, pretended to convey said land to Jacob G. Ross, with like intent on his part, who, without consideration and for like purposes, pretended to convey said land to Rebecca Coon and Frank R. Coon; that at the time of such fraudulent conveyances Archibald F. Coon was indebted to various creditors six thousand dollars, and the judgment debtors, Westover and Williams, were entirely insolvent, the latter being out of the state and a fugitive from justice; that Archibald F. Coon has no other property except said land, which, if free of encumbrance, and with an unclouded title, is worth about eight thousand dollars, out of which said judgment can be made, but which, by reason of said fraudulent conveyances, could not be sold to satisfy the same; with prayer that the conveyances be set aside, and for general and complete relief.

The bill of Samuel H. Steele represents his judgment (by proceedings in attachment commenced October 25, 1884) against Archibald F. Coon and William H. Westover for the sum of \$1,535.66, with interest at ten per cent per annum, rendered in the district court of Butler County December 8, 1884, and levied upon the same property, with prayer for like relief.

That of David Belsley represents his judgment against Archibald F. Coon and William H. Westover for the sum of \$1,264.30, on note made by the parties August 12, 1884, for \$990, with interest at ten per cent per annum, rendered in the district court of Butler County June 6, 1887, with prayer for like relief.

The record of the judgment of Sumner & Co., on note of Westover, Williams, and Coon, dated April 22, 1884, for \$2,000, at ten per cent interest, in district court of Butler County June 6, 1887, for the sum of \$2,633.33 and \$24.83

costs, was filed in the case as a lien against the real estate in the creditors' bills herein.

The defendants answered, setting up that on October 13, 1884, A. F. Coon and Rebecca, as husband and wife, executed and delivered certain deeds of conveyance of said land to J. G. Ross, at the special instance and request of Rebecca; that the same were made in good faith, and for the valuable consideration of four thousand dollars, and on March 27, 1883, the land was deeded by Rebecca Coon and said Ross to Rebecca Coon and Frank R. Coon jointly; that Rebecca Coon unintentionally failed to have her deeds recorded, and the same became lost, without the intention of delaying or defrauding the creditors of A. F. Coon, or aiding him to contract future indebtedness; that at the time of said conveyances to Ross, and by him to Rebecca and Frank R. Coon, defendant A. F. Coon was not indebted to any person or persons, and did not after that time become indebted on his own account, or that of either of the defendants, or of any other person in whom he was pecuniarily interested; and all of the debts contracted after the execution of said conveyances were security debts for others, from which the defendant A. F. Coon neither received nor was promised nor expected any consideration for himself or any other person; and the judgment which the plaintiff recovered and holds against him is a security debt, for which these defendants nor either of them received any consideration whatever; that the debt so contracted to the plaintiffs, as well as all other debts which A. F. Coon may now owe as security for others, were contracted without the knowledge or consent of the co-defendants, or either of them. It is further set up that at the time A. F. Coon first conveyed the land to Ross, Rebecca Coon was his wife, and the conveyances were made for the express purpose of being reconveyed to the wife and her son, Frank R. Coon. At the time, and prior thereto, Rebecca Coon was the owner of lots 1, 4 and 5, in block 47, in David City, which were of the value of \$1,600, purchased by her of one Rolph, with her own money from her father's estate, in the month of June, 1881; that as part consideration for the land in controversy, on March 27, 1883, she conveyed said town lots to Ross, to be conveyed to A. F. Coon, which was executed on the same day; that, as a further consideration for the land, she paid A. F. Coon, on the same day, the sum of \$850. And as a further consideration, she discharged and released A. F. Coon from

an obligation and debt which was owing by him to her, of \$1,700, contracted as follows, in cash:—

In the year 1867	\$500
In the year 1872	100
In the year 1876	100
In the year 1880	500
In the year 1880	168

Which sums were received from her father's estate, and were loaned by her to A. F. Coon, under an agreement between them at said times that the same should be repaid.

It is also set up that the deeds and conveyances made on the 13th of October, 1884, by the defendants conveying the land in controversy, were so made in lieu and place of those of March 27, 1883, which had become lost. Defendants deny all allegations of fraud, and deny that A. F. Coon was the owner of the land in controversy at the time of signing the note on which the plaintiffs' judgments are based, or that the land at that time was standing in his name; with prayer for complete discharge from the complaints of the petitioner's bill.

The First National Bank of Seward made reply, denying the allegations of the defendants' answer, except that the deeds mentioned were executed March 27, 1883, and that those of October 13, 1884, were in lieu of those of March 27, 1883, and that defendant Coon was a surety on the note taken by plaintiff, on which the judgment is based; and avers that the defendants, by reason of their failure to place on record in Butler County, Nebraska, the deeds alleged to have been made March 27, 1883, until long after contracting the indebtedness to plaintiff, which was contracted upon the responsibility of A. F. Coon, and upon the fact that the title to the land mentioned stood in his name, upon which the plaintiff relied that he was the owner thereof, and had no means of knowledge that A. F. Coon had ever made the deeds of date March 27, 1883, as stated in the answer; that by reason of the fraudulent acts of the defendants in negligently and carelessly withholding from the records the deed of March 27, 1883, the defendants are estopped from claiming any rights whatever under said deeds, or any interest in said land as against the plaintiff.

The answer of defendants to the bills of Steele and Belsley were of the same tenor and defense as that stated in the case of the bank; that of the minor defendant, Frank R. Coon, was by guardian *ad litem*.

There was a stipulation by the parties in the court below that the several cases of the First National Bank of Seward, Samuel H. Steele, David Belsley, and Sumner & Co. against Archibald F. Coon and others shall be consolidated for the purposes of trial and the final determination of the rights of the several parties as of the 14th of July, 1887; that in the cases of Sumner & Co. and Belsley, the defendants shall answer as of that date to the same effect as in the cases of the bank and of Steele, and replies in all cases shall be to the effect of that in the case of the bank; and that the parties in each case may severally object to all testimony offered as to competency and relevancy the same as if taken separately, with other special provisions as to the equal terms in the several cases upon which the merits of each shall be considered and adjudicated, not deemed necessary to further set out; the agreement to be filed, and treated as a part of the record of the consolidated case as a general stipulation, dated February 9, 1888.

There was a trial to the court under the terms of this stipulation, with findings for all the defendants, and judgment that the consolidated case and the several actions upon which it is founded be dismissed, at the cost of the plaintiffs, and that the title to the land in the petitions described be forever quieted and settled in the defendants Rebecca Coon and Frank R. Coon, jointly.

It appears from the bill of exceptions that on the twenty-seventh day of March, 1883, and for a long time prior, the defendants Archibald F. Coon and Rebecca Coon were husband and wife, and that the defendant Frank Coon was their infant and only child. Archibald F. Coon was the owner of a farm adjoining David City, consisting of about 160 acres of improved land, of the value of \$5,285. Rebecca Coon was the owner of a homestead in David City, consisting of three city lots, on which were a dwelling-house and appurtenances, which were used and occupied by all of the above-named defendants as their family homestead. The occupation of Archibald F. Coon was that of United States postmaster at David City, and he was not indebted. Rebecca Coon, after her intermarriage with Archibald, had received from her father during his life, and from his administrators after his death, at sundry times and in various amounts, the aggregate sum of about four thousand dollars. About \$1,850 of this money she had, at sundry times and in different

amounts, loaned to her husband, the said Archibald, \$1,650 of which she had invested in the purchase of the homestead in David City, occupied by the family, as above stated, and about \$500 of which she had then in possession. It also appears that at the said date Archibald F. Coon and Rebecca Coon executed a deed to the defendant J. G. Ross of the farm above referred to, and Ross executed a deed of the same property to Rebecca Coon and Frank Coon, the minor. At the same time, Rebecca Coon and Archibald F. Coon executed to said J. G. Ross a deed of the homestead above referred to, and Ross executed a deed of the homestead to Archibald F. Coon. These deeds were all placed, by the attorney who draughted them, into the hands of Rebecca Coon. They were none of them ever recorded.

On the twelfth day of August, 1884, Archibald F. Coon, together with one J. Robert Williams, and as surety for him, executed and delivered to the Platte Valley Bank a promissory note for the sum of \$990, due the first day of September next thereafter. On the first day of October, 1884, he, together with said J. Robert Williams, and one W. H. Westover, and as surety for them, executed and delivered to Samuel H. Steele a promissory note for two thousand dollars, due thirty days from said date. On the twenty-second day of April, 1884, he, together with Westover and Williams, and as surety for them, executed and delivered to Sumner & Co. a promissory note for two thousand dollars, due thirty days from said date, and on the twenty-second day of August, 1884, he, together with said J. Robert Williams and W. H. Westover, and as surety for them, executed and delivered to the First National Bank of Seward a promissory note for fifteen hundred dollars, due on the twenty-second day of October, 1884. These notes were afterwards reduced to judgment by the respective holders thereof as against the said Archibald F. Coon, and which judgments are sought to be enforced by the respective creditors' bills in this action. (The note to the Platte Valley Bank passed into the hands and became the property of the plaintiff David Belsley.)

It further appears that some time between the first and thirteenth days of October, 1884, the said J. Robert Williams and W. H. Westover, who were engaged in business as co-partners under the firm name and style of Westover and Williams, failed in business, became and were insolvent, and one of them absconded. Thereupon some of the said

creditors began to press the said Archibald F. Coon for payment.

It further appears that on the thirteenth day of October, 1884, Archibald F. Coon and Rebecca Coon executed another deed to J. G. Ross of the said farm, and Ross executed another deed of the same property to Rebecca Coon and Frank Coon. At the same time Rebecca Coon and Archibald F. Coon executed to said J. G. Ross another deed of the homestead, and Ross executed another deed of the homestead to Archibald F. Coon. All of these last-mentioned deeds were immediately placed upon record. After the recording of the above conveyances Archibald F. Coon had no property standing in his name out of which the said judgments, or any of them, could be made or collected.

It is one, though not the principal, ground of contention on the part of the defendants, that the case turns upon the consideration of the conveyances made on the twenty-seventh day of March, 1883, and that as at that time the defendant Archibald F. Coon was not indebted to any one, and especially not indebted to any or either of the plaintiffs, and did not purpose or contemplate entering upon or engaging in any hazardous enterprise, and especially not those which resulted in the indebtedness upon which plaintiffs' judgments were rendered, the conveyance of the farm made on that day, even if voluntary and without consideration, was not nor could have been fraudulent. The other and principal ground is applicable to both sets of conveyances, that Rebecca Coon was a *bona fide* creditor to the extent of about \$1,900, for money actually loaned to him by her, which she had received from her father and from her father's estate; that this indebtedness, together with \$500 which she then had in hand, derived also from her father's estate, and which she paid to Archibald F. Coon on the day of the execution of the first set of deeds, and the homestead, which was worth and had actually cost her \$1,650, and was conveyed to Archibald F. Coon as for that sum as a consideration, constituted a full and fair consideration for the conveyance of the farm from Archibald F. Coon to Rebecca Coon and Frank Coon; so that as to the last set of conveyances, although at the date of their execution Archibald F. Coon had incurred the obligation upon which the several plaintiffs' judgments were afterwards rendered, as none of the liens had then attached, the conveyance of the farm was free from fraud either in fact or in law.

Neither of the conveyances of the farm can be upheld as a voluntary conveyance; the second conveyance, for the obvious reason that at its date the grantor, Archibald F. Coon, had already incurred the obligations upon and for which the several judgments of the plaintiffs were afterwards rendered against him; and the first conveyance, for the reason that the deed was in law concealed and not pursued in not being placed upon record, in the due and ordinary course of business in like transactions, nor until after the incurring of the obligations by the grantor which are now sought to be enforced against said farm, — indeed, never was recorded.

“A deed not fraudulent at first may become so afterwards by being concealed or not pursued, by which means creditors have been drawn in to lend their money”: *Hildreth v. Sands*, 2 Johns. Ch. 35. “A deed concealed from the public, the grantor remaining in possession and acquiring credit on the strength of his supposed ownership of the property, is fraudulent”: *Barker v. Barker's Assignee*, 2 Woods, 87. In addition to cases cited in the brief of counsel for appellants, see also *Sexton v. Wheaton*, 8 Wheat. 229; *Worseley v. De Mattos*, 1 Burr. 467; *Leukner v. Freeman*, Freem. 236.

But the conveyance of the farm made on the thirteenth day of October, 1884, will be upheld to the extent of the actual consideration which passed therefor between the Coons, husband and wife.

In the case of *Aultman v. Obermeyer*, 6 Neb. 260, this court, in the opinion, said: “Transactions between husband and wife, in relation to the transfer of property from one to the other, by reason of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and the *bona fides* of such transactions will have to be established beyond question in order to be sustained by a court of equity.” Said case was cited, and the above from the opinion quoted in the opinion in the case of *First National Bank v. Bartlett*, 8 Neb. 319; and to the quotation is added: “The reason is, that there is such a community of interest between husband and wife, that such transfers are often resorted to for the purpose of withdrawing the debtor's property from the reach of his creditors, and preserving it for his own use. Therefore, in a contest between the wife and the creditors of her husband, there is a presumption against her which she must overcome by affirmative proof.” The above was reiterated in the case of *Thompson v. Loenig*, 13 Neb. 386, and again in that of *Lipscomb v. Lyon*, 19 Neb. 511.

But admitting the presumption to be against Mrs. Coon, and subjecting the facts of the case as shown by the bill of exceptions to the severest scrutiny and closest examination, it appears that she has invested in the farm about two thousand four hundred dollars in money derived from her father and from his estate in the farm in question, and that she did this in good faith. True, this investment was consummated by the first conveyance, which was never recorded, but this was not a voluntary conveyance, but made upon a good and valuable, if not upon a full, consideration. The failure to record the deed was not intentional on the part of the grantee, although there is some evidence tending to prove that she kept the deed off of the records lest a knowledge of the conveyance might cause uneasiness on the part of the bondsmen of Archibald F. Coon as postmaster. This evidence is sufficiently rebutted. But be that as it may, although the first deed was not recorded until after the incurring of the obligations by Archibald F. Coon, upon which plaintiffs' judgments were rendered, Mrs. Coon was placed in no worse condition than though it had never been made; and it having been lost or accidentally destroyed, there was no fraud on her part in receiving a new conveyance to replace it to the extent of the money which she had actually advanced or paid to her husband as a consideration therefor. How was it on the part of Archibald F. Coon at the date of the last conveyance? He had become obligated to the plaintiffs to pay them large sums of money; he had also received from his wife a much larger sum. None of the former had become liens upon the farm; the latter, by reason of the last conveyance, was, to say the least of it, an equitable lien upon the farm. It was, therefore, as I conceive, no fraud against the plaintiffs for him to pay or secure the money received from and due to his wife by a reconveyance of the farm.

In speaking of the amount of the consideration advanced and paid to Archibald F. Coon by Rebecca Coon for the conveyance of the farm, I do not include the value of the homestead. The former as the husband of the latter, and being in the actual possession of this property, they, together as one family, residing upon and occupying it as a homestead, although the general title was in the wife, had an indefeasible estate in it; and while I do not say that the conveyance of such general title by her to him was no consideration for the conveyance of the farm by him to her, it is obvious that the general value

of the homestead as property in the market furnishes no measure or index of the value of a conveyance of such general title from the wife to the husband. Before such conveyance, as well as after, no conveyance of the homestead to a third person, without the assent and signatures of both husband and wife, would be effective or binding upon either, nor would any encumbrance sought to be created or suffered; and upon the death of either, at least a life estate therein will vest in the survivor. I therefore conclude that while, under the facts and circumstances of this case, the legal title of the farm passed to Rebecca Coon and Frank Coon by virtue of the deed of October 13, 1884, they took and hold such title subject to the equities and liens of the plaintiffs, or those of them whose claims or judgments became liens against the property of Archibald F. Coon prior in point of time, to the extent of the fair market value of said farm over and above the sum of two thousand four hundred dollars.

The decree of the district court is reversed, and a decree will be entered in this court for the plaintiffs, establishing their several and respective liens upon the said farm in the order of their several and respective priorities, as hereinafter stated, subject, nevertheless, to the prior lien and title of the said Rebecca Coon and Frank Coon to the sum, amount, and value of two thousand four hundred dollars thereon.

The several and respective amounts and priorities of said liens are fixed and declared as follows:—

1. Rebecca Coon and Frank Coon. Amount, \$2,400. Date, March 27, 1883.

2. Samuel H. Steele. Amount, \$1,548.11. Date, October 25, 1884.

3. First National Bank of Seward. Amount, \$1,669.53. Date, November 17, 1885.

4. David Belsley. Amount, \$1,264.30. Date, June 6, 1887.

5. Sumner & Co. Amount, \$2,658.16. Date, June 6, 1887.

For the purposes of such decree, the value of said farm is found and fixed at \$5,285.

Upon the payment by the defendants, Rebecca Coon and Frank R. Coon, to the clerk of this court, within six months from the date of the entry of this decree herein, of the sum of \$2,885, with interest thereon from the date of said decree at seven per cent, and the costs of this action in both courts, to be distributed to the plaintiffs according to the priorities of their several and respective liens, the said farm will be fully

and entirely discharged of and from said liens, and each and all of them.

Decree accordingly.

FRAUDULENT CONVEYANCES — HUSBAND AND WIFE. — A wife may bargain with her husband for any amount which is due her from him, and may take a conveyance from him in satisfaction thereof: *Wooden v. Wooden*, 72 Mich. 347; *Cornell v. Gibson*, 114 Ind. 144; 5 Am. St. Rep. 605, and note; which cannot be set aside by other creditors of the husband to satisfy their demands: *Citizens' Nat. Bank v. Webster*, 76 Iowa, 381; *Peck v. Lincoln*, 76 Iowa, 424; *Iowa City Bank v. Weber*, 72 Iowa, 137; *Rockford etc. Mfg. Co. v. Mastin*, 75 Iowa, 112.

Where a husband's land was encumbered by liens to its full value, and his wife, by paying off such liens with her own money, became the owner thereof, she took good title as against the general creditors of her husband: *Stone v. Brown*, 116 Ind. 78.

A husband in failing circumstances may convey to his wife land in part consideration of his indebtedness to her; yet if the real value of the property greatly exceeds the consideration expressed in the conveyance, it will be void as to the other creditors of the husband: *Torrey v. Cameron*, 73 Tex. 583. In *Gaar v. Hart*, 77 Iowa, 597, where the consideration of a deed made by a debtor was sixteen hundred dollars, but one thousand only was actually paid, in an action to set aside such deed, and charge the property thereby conveyed with the grantor's debts, the parties failing to show the actual consideration of the deed to be more than one thousand dollars, it was decided that as to the six hundred dollars the conveyance was fraudulent as being voluntary, even though the grantee was not guilty of actual fraud in attempting to hinder the creditors of the grantor.

While a husband has the right to make voluntary conveyances to his wife: *Hamaker v. Hamaker*, 88 Ala. 431; *Jackson v. Torrence*, 83 Cal. 52; *O'Neil v. Seixas*, 85 Ala. 80; *Lewis v. Simon*, 72 Tex. 470; note to *Dixon v. Sanderson*, 13 Am. St. Rep. 805; notwithstanding he may be in debt at the time, still these gifts cannot embrace all his property, and when he is financially embarrassed, or ought to foresee that his creditors will be injured thereby, they will not be sustained: Note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 749 et seq. Where personalty was bequeathed to a wife, and her husband appropriated it, sold it, and used the proceeds thereof, conveying to her land in consideration thereof, the conveyance was held voluntary: *Rixey v. Deitrick*, 85 Va. 42. For although a consideration may be recited in a conveyance, such conveyance is nevertheless voluntary if such consideration is not in fact a valuable one: *O'Neil v. Seixas*, 85 Ala. 80. A verbal promise to convey realty in consideration of marriage is not such a consideration as to validate a conveyance as against creditors: *Manke v. Manke*, 75 Mich. 435.

Less proof of fraud is required in transactions between husband and wife than in ordinary transactions, and because of the relation of the parties the court should scrutinize contracts between husband and wife very closely: *Brown v. Mitchell*, 102 N. C. 347; 11 Am. St. Rep. 748, and note; note to *Driggs v. Norwood*, 7 Am. St. Rep. 83; *Burt v. Timmons*, 29 W. Va. 441; 6 Am. St. Rep. 665, and note.

FRAUDULENT CONVEYANCES — CONCEALMENT OF TRANSFER. — Concealing the existence of a conveyance, and failing to record it, may work injury to the creditors of the grantor and render the conveyance fraudulent: *Stock Growers' Bank v. Newton*, 13 Col. 245; *Fetters v. Duvernois*, 73 Mich. 481.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

KRANZ v. LONG ISLAND RAILWAY COMPANY.

[123 NEW YORK, 1.]

MASTER'S DUTY TO PROVIDE FOR HIS SERVANT REASONABLY SAFE PLACE TO WORK IN. — A master owes to his servant the duty of providing for him a place reasonably safe for the work which he is directed to do; and when this duty is performed by the master through other servants, they are regarded as performing the master's duty, and the servant has the right to assume that the place has been made reasonably safe. Where, therefore, in an action to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence, the evidence shows that the intestate being ordered to clean out certain underground water-pipes, a trench was opened to furnish a proper place for doing the work, by the defendant's section-man and laborers under its direction, and the earth caved in upon and suffocated the intestate, the question of defendant's negligence should be submitted to the jury, and it is error to grant a nonsuit.

ACTION to recover damages for negligence. The opinion states the case.

A. N. Weller, for the appellant.

E. B. Hinsdale, for the respondent.

FINCH, J. We are of the opinion that the nonsuit granted in this case was erroneous, and that the question of the defendant's negligence was improperly withheld from the jury.

The plaintiff's intestate was a young man about eighteen years of age, who had entered the machine-shops of the defendant company to learn the trade and pursue that branch of labor. He was ordered to go to the depot at Bay Ridge to clean or aid in cleaning certain water-pipes placed under-

ground at that point. A trench was opened for that purpose by the section-man and laborers under his direction some hours before the intestate began work upon the pipes. That was a necessary step to furnish him a suitable place and proper opportunity for the performance of his own duty. He entered the trench and began to disconnect the pipes, and while so engaged the earth caved in upon him, and he died of suffocation.

The defendant owed to its servant the duty of providing a place reasonably safe for the work which he was directed to do. Those who opened the trench were performing the master's duty to the deceased in preparing a suitable place and opportunity for the labor of the intestate in discharge of his duty. The general term conceded so much, but held that the danger, if any, was as obvious to the servant as the master, and the former chose to take the risk. That proposition is incorrect as a legal conclusion from the proof, and is scarcely defended on this appeal; but the nonsuit is sought to be sustained upon the ground that they who opened the trench were fellow-servants of the intestate engaged with him in a common enterprise, and whose negligence, if any, in not bracing or protecting the sides of the trench was one of the risks which the deceased assumed. I think the decisions of this court are adverse to that view. The general question was very much discussed and quite fully considered in *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627, and later applied to different facts in *Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368, and *Benzing v. Steinway*, 101 N. Y. 547. In these cases the duty of the master to exercise reasonable care in furnishing to the servant safe tools and appliances, competent co-servants, and a safe place in which to work was fully recognized. When the master ordered the intestate to perform his work as a machinist in the trenches opened and prepared for him, he had a right to assume that the place had been made reasonably safe by the master through other and competent servants employed by him. The case is not like *Murphy v. Boston etc. R. R. Co.*, 88 N. Y. 152, 42 Am. Rep. 240, as the respondent insists, because there no specific duty of the master to his servant was shown to have been violated. In the present case there was evidence tending to that result. Whether the trench was opened with reasonable care, whether any danger was obvious to the deceased, whether greater precaution should have been exercised against the falling of the

bank, whether the agents employed were skillful or inexperienced, and so whether on all the facts the defendant was negligent, are questions of fact to be solved by the jury.

Upon the argument before us the case of *Cook v. New York etc. R. R. Co.*, 119 N. Y. 653, recently affirmed without an opinion, was called to the attention of counsel. The cause of the injury in that case was a caving in of the sides of a trench, as in the action before us. The respondent suggests to us that the decision of the Cook case turned wholly upon the defendant's negligence in failing to employ a competent superintendent. That is true. The workman there was steadily making or assisting in making his own place in which to work. If it became unsafe, his own negligence co-operated and barred his remedy unless he acted under the master's orders given by an incompetent superintendent. But here the deceased had nothing to do with the preparation of the trench. It was prepared, not by him, but for him, and reasonable care in its preparation, we think, was the master's duty to the servant. Indeed, our attention is called to some evidence, introduced without objection, tending to show want of skill and experience on the part of the section-master who directed the excavation. We form no opinion upon the facts, and express none, but leave the case for the judgment of a jury.

The judgment should be reversed, and a new trial granted, costs to abide the event.

MASTER AND SERVANT—MASTER'S DUTY TO PROVIDE HIS SERVANTS WITH A SAFE PLACE IN WHICH TO WORK. — A master must furnish a reasonably safe place to his servant in which to perform their services: Note to *Malone v. Hathaway*, 21 Am. Rep. 579; *Smith v. Peninsular Car Works*, 60 Mich. 501; 1 Am. St. Rep. 542; *Nadau v. White River L. Co.*, 76 Wis. 120; *ante*, p. 29, and note.

ROBERTS v. STUYVESANT SAFE DEPOSIT COMPANY.

[123 NEW YORK, 57.]

DUTY OF BAILEE FOR HIRE WHERE PROPERTY IS DEMANDED BY THIRD PERSON UNDER COLOR OF PROCESS. — When property in the custody of a bailee for hire is demanded by a third person under color of process, it is his duty to ascertain whether the process is such as requires him to surrender the property, and if it is not, it is his right and duty to refuse to surrender it, and to offer such resistance to the taking, and adopt such measures for reclaiming it if taken, as a prudent and intelligent man would if it had been demanded and taken under a claim of right to the property by another without legal process.

BAILEE CANNOT DEFEND BY SHOWING BAILOR'S PROPERTY WAS TAKEN FROM HIM UNDER LEGAL PROCESS WHEN. — While a bailee who permits the property of the bailor to be taken by a stranger may excuse himself by showing that he yielded to the power of legal process, a seizure under such process, after the bailee has negligently allowed the property to pass into the hands of trespassers, or persons who have no right to it, will be no protection to him in an action by the owner. The mere levy of an execution or attachment upon property by a creditor of the owner, while it is in the possession of the tort-feasor is not, therefore, available as a defense or in mitigation in an action by the owner against the bailee for the conversion or negligent loss of the property bailed.

BAILEE CANNOT JUSTIFY OR DEFEND UNDER REVERSED JUDGMENT WHEN. — Where a bailee wrongfully and negligently permits his bailor's property to be appropriated by the latter's creditors under attachments and executions in cases in which the judgments were released and discontinued, he cannot, in an action against him by the bailor, justify or defend under such judgments. The attachments and executions fall with the judgments, and the judgment creditors would be compelled to make restitution, and the bailee cannot stand in any better position.

REFUSAL OF COURT TO MAKE FINDINGS IS ERROR WHEN. — Where, in an action against a bailee to recover for property wrongfully permitted by him to be appropriated by the bailor's creditors under a judgment against the bailor, there is evidence tending to show, and plaintiff's counsel requests the court to find, that said judgment was entered upon an offer of judgment made by an attorney for plaintiff without authority and in fraud of her rights; that the execution thereon was issued after the attachment in the case was dissolved, and that it directed the sale of the attached property in the same manner as if the attachment was in force; that the execution was issued to a person who had no authority to serve it or to sell the property, and that the sale thereunder was itself fraudulent and unfair, — it is error for the court to refuse to find on these matters, as without findings thereon it cannot be legally determined that the property came to the plaintiff's use, or that she had the benefit thereof.

ACTION to recover for alleged negligence of a bailee for hire. The opinion states the case.

Ira Shafer, for the appellant.

Charles E. Miller, for the respondent.

O'BRIEN, J. The legal relations which the defendant held to the plaintiff, and out of which this controversy has arisen, was that of a bailee or depositary for hire. The fundamental question in the case is, whether the defendant, upon the undisputed evidence in the record, discharged those duties and obligations to the plaintiff which the law imposed upon it in regard to the care and custody of her property. The defendant is a corporation organized under and possessing all the powers conferred by chapter 111 of the Laws of 1867. It was authorized to receive on deposit, as bailee, for safe-keeping and

storage, jewelry, plate, money, securities, and other valuable things upon such terms and for such compensation as might be agreed upon by the said corporation and the owners of the property or the bailors. On the twenty-sixth day of July, 1873, the defendant delivered to the plaintiff an instrument in the form of a receipt, whereby the defendant acknowledged that it had received from the plaintiff, residing at 206 West Twenty-first Street, in the city of New York, the sum of twenty dollars for the rental of safe No. 6,012 in the vaults of the Stuyvesant Safe Deposit Company for the term of one year from that date, "and subject to the rules of the company, printed on the back of this receipt." One of these rules provides that "the responsibility of this company with regard to property deposited in the rented safes is limited to the diligent and faithful performance of their duty by the officers and employees of the company." Another provided that no person would be allowed inside the vaults for the purpose of opening any safe therein except the renter, or his substitute, named in the books of the company, and that two persons would not be allowed to enter the vault at the same time unless personally known to one of the defendant's officers. The plaintiff was furnished with a key to the safe thus rented as provided for by the rules, and she placed a tin box in it for the purpose of holding such property as she desired to place therein. On the 15th of October, 1873, the plaintiff had in this box, which was locked up in the safe rented from defendant, a large sum of money, some fourteen United States bonds, and also numerous other bonds issued by various railroad and telegraph companies, the whole amounting to over forty thousand dollars in value. On that day the recorder of the city of New York issued a search-warrant under his hand and seal, reciting that complaint had been made to him on oath by one Pinkerton that about December 10, 1872, one hundred United States bonds of the par value of seventy-five thousand dollars, and four Louisville water bonds of one thousand dollars each, had been feloniously stolen and carried away from the Third National Bank of Baltimore by certain persons named in the warrant, as was suspected, and that said property was then concealed in three certain boxes or safes in defendant's vaults, one of which was the box or safe rented by the plaintiff. The warrant, which was directed to the sheriff of the city and county of New York, or to any policeman of the municipal police of said city, then commanded the officers

to whom it was addressed to diligently search in the daytime the said boxes or safes in the said premises where the said property was suspected to be concealed, and when found, to bring the same before him to be dealt with according to law. Armed with this warrant, a police captain, accompanied by another police-officer and by Pinkerton and a person prepared to break into the safe, appeared at the defendant's place of business, and demanded access to the safe used by the plaintiff.

It is found that the defendant's officers protested against the proposed action of these parties, but they made no other resistance, and they furnished the officers with the means of identifying the safe in which the plaintiff's property was, or pointed out the safe to him, and the officer then broke it open and removed the tin box from the same. After the formal protest on the part of the defendant's officers, no attempt was made by them to interfere with the officers, who expressed a determination to enter the safe by force. A list of the contents of the box was made by one of defendant's officers and the police. There was found in it over nine thousand dollars in money, besides the railroad and telegraph company bonds, but nothing corresponding to the property described in the search-warrant, except fourteen United States bonds; and as to these, the warrant contained nothing that would enable any one to identify them by number, date, issue, or otherwise, as the stolen property, or any part of it, which was described in the warrant. The officer carried all the contents of the box away, and instead of bringing it to the recorder who had issued the warrant, and before whom it was returnable, and who had power to inquire in regard to the ownership of the property, the officers delivered the box and its contents to the district attorney. It does not appear that any investigation was ever made to ascertain whether any of the property thus carried away was in fact stolen. There is no proof or finding in the case that it was; and the defense of this action proceeded upon the theory that it in fact belonged to the plaintiff. The defendant's officers were not taken by surprise when the police captain and his associates appeared and, upon the authority of a search-warrant, demanded admission to the vault. It appears that, a day or two before, one of the assistants of the district attorney called at the defendant's place of business and inquired of the book-keeper if the plaintiff's husband and another man had safes in the vault. The book-keeper refused

to answer the question, and upon such refusal he was informed by the assistant, in substance, that he would show him that he "must tell." The next day the book-keeper was served with a subpoena by the district attorney to testify before the grand jury, and to have with him all books and papers of the defendant containing the names of depositors in the safes or vaults of the company. The book-keeper then consulted with the president, and they concluded that it would not do to bring the books into court, but that they would take a memorandum from them of the names of the parties, and in this way the district attorney became informed that the plaintiff also had a safe in the vault of defendant. The defendant's officers were not bound to resist the execution of the warrant by the employment of force, but the warrant afforded no excuse or justification for the removal of property from the defendant's custody that was not described therein, and hence in this case the police had no right to remove any of the plaintiff's property found in the safe, except possibly the United States bonds. As to all the other property, the defendant could have used such means to prevent its removal as would be proper and justifiable in case the same parties attempted to remove it without having any warrant or legal authority whatever. In carrying away property not called for by or described in the warrant, the police and other persons assisting them were trespassers, and we think that the defendant's officers neglected to make such opposition to the trespass as they could and should have made under all the circumstances. The police could not have proceeded to execute the warrant without first exhibiting it or at least stating its contents, and it must be assumed that they would have done if so requested. There is no proof and no finding that after the safe was broken open and the tin box found to contain property not mentioned in the warrant, that the defendant's officers called the attention of the police to the fact or forbade its removal. Indeed, none of the defendant's officers asked to see the warrant or informed themselves in regard to its contents or took any means to ascertain whether the contents of the box or any part of it was called for by the process under which the police assumed to take possession of the property and remove the same from the defendant's custody. They made no attempt to notify the plaintiff of what had transpired, although they had her name and address, and she resided not more than three fourths of a mile distant. They made no attempt to procure

a return of the property, which seems to have been delivered to the district attorney instead of bringing it before the recorder, according to the command of the warrant to be "dealt with according to law." We think that the defendant's officers neglected to exercise, in the care and keeping of the property which the plaintiff had confided to their charge, that degree of diligence and fidelity to which they were bound by the terms of the contract under which the property was deposited in the defendant's vault as well as by the legal relations which they then assumed to the plaintiff: *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263; *Jones v. Morgan*, 90 N. Y. 4; 43 Am. Rep. 131. It is no doubt true that a bailee for reward, such as the defendant was, may excuse himself for a failure to deliver the property to the bailor when called for, by showing that the property was taken out of his custody under the authority of valid legal process, and that within a reasonable time he gave notice of that fact to the owner: *Eliven v. Hudson R. R. Co.*, 36 N. Y. 403; *Western T. Co. v. Barber*, 56 N. Y. 544; *Van Winkle v. United States M. S. S. Co.*, 37 Barb. 122; *Livingston v. Miller*, 48 Hun, 232; *Stiles v. Davis*, 1 Black, 101.

But in this case the persons who took the property had no process that authorized them to do so, and hence the defendant had the right to make such resistance to it as they would have had if the same parties attempted to take it without any process whatever, and if overcome by superior force they could pursue and reclaim it by legal proceedings or otherwise in the same manner as if the search-warrant had not been procured. When property in the custody of a bailee for hire is demanded by third persons, under color of process, it becomes his duty to ascertain whether the process is such as requires him to surrender the property, and if it is not, then it is his right and duty to refuse and to offer such resistance to the taking, and adopt such measures for reclaiming it if taken, as a prudent and intelligent man would if it had been demanded and taken under a claim of right to the property by another without legal process. The defendant did not discharge the duty that it owed to the bailor and owner of the property by merely making a formal protest against entering the vaults where the property was. A person who would allow his own property to be taken from him under like circumstances, and without doing more to prevent such a result, or to repossess himself of it when taken, could scarcely be called a prudent man. It

follows that the defendant has not shown that the property was taken from its possession by legal process so as to excuse its loss. The answer presents another very important question arising out of transactions in regard to the property after it was taken from the possession of the defendant. It seems that while the property was in the custody of the district attorney it was levied upon by parties who were, or claimed to be, creditors of the plaintiff. The answer as amended before and at the trial avers the commencement of four different actions against the plaintiff, in which attachments were issued and levied, judgments recovered on some of them, and levies made upon the property in question, and sales thereunder, and an application of the proceeds upon the judgments, or some of them. The case was tried by the court without a jury, and while the findings state the commencement of the actions, the issuance of attachments and levy thereunder, the entry of judgment and levy of execution, there is no distinct finding that the proceeds were applied upon any judgment against the plaintiff. While a bailee who permits the property of the bailor to be taken by a stranger may excuse himself by showing that he yielded to the power of legal process, it does not follow that a seizure under such process, after the bailee has negligently allowed the property to pass into the hands of trespassers, or persons who have no right to it, will be any protection to him in an action by the owner. When the defendant permitted the property to be taken from its custody without using proper diligence and care to retain or reclaim it, the plaintiff's cause of action accrued, and could not be defeated by the action of parties seeking to establish claims against the owner. The rule in such cases seems to be, that when a bailee is sued by the owner for the conversion or negligent loss of the property bailed, it is not a defense or bar to the action to show that after it went into the possession of others, it was levied upon under process against the owner. If it can be shown that the bailor become repossessed of the property, or that it came to his use, or that he had the benefit of it by application through regular legal proceedings upon a judgment against him, such facts will go in mitigation of damages: 2 Greenl. Ev., sec. 276; *Ball v. Liney*, 48 N. Y. 6; 8 Am. Rep. 511; *Wehle v. Butler*, 61 N. Y. 245, 249; *Hanner v. Wilsey*, 17 Wend. 91; *Otis v. Jones*, 21 Wend. 394; *Higgins v. Whitney*, 24 Wend. 379; *Sherry v. Schuyler*, 2 Hill, 204; *Lyon v. Yates*, 52 Barb. 237; *Sprague v. McKinzie*, 63 Barb. 60;

Peak v. Lemon, 1 Lans. 295; *Pierce v. Benjamin*, 14 Pick. 356; 25 Am. Dec. 396.

We do not think that the mere levy of an execution or attachment upon the property by a creditor of the owner while it is in the possession of the tort-feasor is available as a defense or in mitigation. It must be shown that the owner had the benefit of it in such a way as to operate, in law, as a restoration of the property. None of the authorities that have been brought to our attention maintain the proposition that to show a levy alone is sufficient, and such a rule could not be supported in reason or justice. The principles that apply in such cases were stated by Earl, J., in *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511, as follows: "After a conversion of property, the title still remains in the owner, and the property can be taken from the wrong-doer on an execution against the owner, and sold, and the proceeds applied upon his debt, and the owner will thus have the benefit of the property, and in such case the wrong-doer can set up the seizure and sale, not as an entire defense, but in mitigation of damages, for the reason that it would be unjust for the owner to recover the value of the property after he has thus had the benefit of it. It is not the fact of the seizure that gives the defense, but that it has been seized under such circumstances that the owner has had or could have the benefit of it." Some of the judgments set up in the answer were shown at the trial to have been released and discontinued, and of course upon such determination of the suits the attachments and executions fell with them. If any of the property in question was applied upon such judgments, the plaintiff therein would be compelled to make restitution, and it is difficult to see how the defendant could derive any greater measure of protection from the suit, and the process and judgment therein, than the parties themselves could, had the plaintiff brought an action against them to recover the property or its value. In such a suit, the parties who had taken or appropriated the property could not justify or defend under process or judgment that had been reversed or set aside, and the same rule would apply to the defendant. There was, however, one of the judgments in force at the time of the trial. That was recovered for less than ten thousand dollars, and the court found that the property in question, when taken, was worth about forty-three thousand dollars; but as before remarked, it is not found that any of the proceeds of the property were applied to the satisfaction of this judgment, though

there is evidence that would warrant that conclusion. The counsel for the plaintiff requested the court to make numerous findings of fact and law in regard to the manner in which the attachments and executions were served and the levy made, the dissolution of the attachments, the reversal of the judgments, and discontinuance of the actions, which the court refused, on the ground that they were immaterial. Some of them doubtless were, but many of them were not, and consequently should have been found, as there was no dispute in the evidence in regard to them.

As to the judgment which was in force at the time of the trial, it was claimed by the plaintiff's counsel to have been entered upon an offer by an attorney for the plaintiff, without authority for that purpose, and in fraud of her rights; that the execution thereon was issued after the attachment was dissolved, and that it directed the sale of the attached property in the same manner as if the attachment was in force; that the execution was issued to a person who had no authority to serve it, or to sell the property, and that the sale thereunder was itself fraudulent and unfair.

There was evidence to support some of these claims, and the court was requested to make specific findings thereon, which requests were refused, and for the same reason as the other. The plaintiff had a right to distinct findings as to the amount applied upon any of the judgments, the existence of the judgments themselves, and of the attachments and executions, the manner in which any levy relied upon by the defendant was made, and whether any lien was acquired under them, and whether the person who made the sale had authority for that purpose. Without such findings, or at least some of them, it could not be legally determined that the property came to the plaintiff's use, or that she had the benefit thereof, as that result depended upon the extent to which the judgments existing against her, and not reversed or set aside, had been extinguished. In this condition of the case, it would be manifestly impracticable for us to attempt to decide what effect is to be given to the suits and proceeding therein which were instituted against the plaintiff after the property was taken from the defendant, and while in the possession of the district attorney. None of these questions are alluded to in the opinion of the general term, and so far as they were passed upon at all by the trial court, it seems to have been upon the theory that it was sufficient for all the defendant's

purposes to show the issuing of the process and seizure of the property thereunder. Whether these suits and the proceedings in them are available to the defendant in mitigation of damages, and to what extent, are questions to be settled upon another trial, or upon further findings of fact.

As we are constrained to differ from the court below in the conclusion that the defendant performed its duty with reference to the property which it held as bailee, we cannot say, as the case now stands, that the plaintiff was not prejudiced thereby.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

BAILMENTS — DUTY OF BAILEE WHEN PROPERTY IS SOUGHT TO BE TAKEN FROM HIM UNDER PROCESS: See note to *Schmidt v. Blood*, 24 Am. Dec. 156; *Jewett v. Olsen*, 18 Or. 419; 17 Am. St. Rep. 745, and note. Where a carrier allows goods to be taken from its custody by an officer, it is no defense, in an action of trover against it, to show that the goods were taken by an officer, unless it is also shown that the officer had a legal right, under his writ, to take them: *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301.

SCHNEIDER v. UNITED STATES LIFE INSURANCE CO.

[128 NEW YORK, 109.]

MARRIED WOMAN CANNOT RECOVER ON POLICY OF INSURANCE ON HER HUSBAND'S LIFE, FORFEITED BY NON-PAYMENT OF PREMIUM, WHEN. — A married woman cannot claim the benefit of a policy of insurance on the life of her husband, issued for her benefit, but without her knowledge, without at the same time assuming all the responsibility of a failure to perform its essential conditions. And if her husband, after taking out such a policy, which it is stipulated shall become void in case of failure to pay any premium when the same shall become due, upon receiving notice that a premium will become due at a certain time, and before making payment thereof forges her name to a surrender of the policy, which the company in good faith accepts, paying the surrender value by a check made payable to the joint order of the husband and wife, and no payments of premium are thereafter made, she cannot recover on the policy after her husband's death, although the surrender is void and she knew nothing either of the issuance or surrender of the policy until after his death.

ACTION on a policy of life insurance. The opinion states the case.

O. P. Buel, for the appellant.

Lucius McAdam, for the respondent.

O'BRIEN, J. In the year 1861, upon the application of the plaintiff's husband, Henry Schneider, the defendant issued its policy insuring his life for the benefit of the plaintiff. The policy contained the usual stipulation that in case the assured should fail to pay any quarterly premium when the same became due, the policy should lapse and become null and void. The husband retained the policy in his possession, and paid the premiums as they became due up to and including the premium payable January 17, 1886. On the fifteenth day of March, 1886, the defendant duly served the notice required by the statute, that another premium would fall due the 17th of April following. This notice was served upon the husband, who had the policy in his possession, and who was the agent of his wife for the purpose of receiving the notice: Laws of 1877, c. 321. This premium was not paid, and no notice was thereafter served by the defendant. On the 29th of March, 1886, while the policy was in force, the husband produced and surrendered the policy to the defendant, and received \$525, the surrender value, from the defendant, which was paid by its check to the joint order of the husband and the wife. The check was presented, indorsed in proper form, paid by the bank, and charged to defendant. At the same time, the husband presented and delivered to the defendant a paper under seal, purporting to be signed by the wife, and duly acknowledged before a commissioner of deeds, containing a request to accept the surrender of the policy, and a release discharging the defendant from all further liability thereon. The company, relying upon this paper, paid the surrender value, as above stated. The husband died in September, 1886, and until after that the wife had no knowledge of the existence of the policy and her signature to the paper containing the surrender and release, and the indorsement of her name upon the check was forged. She received no part of the \$525 paid on the surrender of the policy. She demanded payment of the policy, and upon refusal, presented proofs of the death, and then brought this action. It was found at the trial, as matter of law, that the surrender was void, and the contract to pay in case of death was unaffected thereby. The plaintiff recovered, and the judgment was sustained by the general term.

The conclusion of the trial court that the surrender was, as against the plaintiff, null and void, and which is clearly correct, renders it necessary for the plaintiff, in order to sustain the recovery, to meet and answer another objection that con-

fronts her. The premium due on the 17th of April, 1886, was not paid. The notice required by the statute was served on the 15th of March preceding, and the existence of the policy as a valid contract of insurance, and the liability of the defendant thereon, depended upon the performance of this condition. The fraudulent surrender of the policy by the husband before the April premium became due in no way excuses the failure to pay the premium, unless the defendant was in some way connected with that fraud, or guilty of some negligent act in regard thereto. There is no proof and no finding that it was. On the contrary, the defendant seems to have been the innocent victim of a fraud perpetrated upon it by the husband, who was the plaintiff's agent in procuring the policy, paying the premiums, and receiving the statutory notice as to when they were due. The paper purporting to be signed by the plaintiff, requesting the defendant to accept the surrender and releasing it from further liability, was in proper form. There was attached to it the certificate of an officer authorized to take and certify acknowledgments that the plaintiff appeared before him and duly acknowledged the instrument, and there was no circumstance that could warrant the defendant in doubting its genuineness. It has been found that the defendant relied upon it, and neither in the findings nor the evidence is there anything to be found to justify a suspicion of bad faith. It cannot be held that the transaction between the defendant and the husband, which resulted in the payment to him of the surrender value of the policy and upon which the defendant relied, was void, and at the same time relieve the plaintiff from the effect of a failure to perform the conditions upon which the existence of the contract depended. The plaintiff cannot claim the benefit of a contract made in her behalf, but, as it appears, without her knowledge, without at the same time assuming all the responsibility of a failure to perform its essential conditions. In those cases where a recovery has been permitted by the beneficiary, notwithstanding a surrender and release such as appears in this case, the party seeking to recover was able in some way to connect the company with the fraud, or to show some fault or negligent act on its part that excused the payment of the premium: *Whitehead v. New York L. Ins. Co.*, 102 N. Y. 143; 55 Am. Rep. 787; *Frank v. Mutual L. Ins. Co.*, 102 N. Y. 266; 55 Am. Rep. 807; *Knapp v. Homœopathic M. L. Ins. Co.*, 117 U. S. 411.

The husband had the possession of the policy, and in deal-

ing with the defendant in regard to it was treated as plaintiff's agent, and the rule that when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act enabled the fraud to be committed, applies to this case.

The judgment should be reversed, and a new trial granted, costs to abide the event.

LIFE INSURANCE — WIFE AS A BENEFICIARY. — A husband who has procured a policy of insurance upon his life for the benefit of his wife may not surrender it without her assent while in force, but if it has become forfeited for non-payment of premiums, he may thereafter surrender it: *Whitehead v. New York L. Ins. Co.*, 102 N. Y. 143; 55 Am. Rep. 787.

MOREY v. MORNING JOURNAL ASSOCIATION.

[123 NEW YORK, 207.]

PUBLICATION LIBELOUS PER SE WHEN. — To publish in a newspaper an article stating that plaintiff was threatened with a breach of promise suit, that he and his friends were moving to effect a reconciliation, but that the young lady insisted on his marrying her, is libelous *per se*, because the tendency of the publication was to disgrace him and bring him into ridicule and contempt. And in an action of libel for such publication the plaintiff may recover without alleging or proving special damages.

EVIDENCE IN ACTION FOR LIBEL TO PROVE GENERAL DAMAGE, WHAT ADMISSIBLE. — In an action of libel for publishing an article in a newspaper, to the effect that plaintiff was threatened with a breach of promise suit, evidence of the nature of the plaintiff's business, and that he was a married man, is competent to show the circumstances surrounding him, and as bearing upon the hurtful tendency of the libel and the general damage to which he was exposed.

DEFENSE IN LIBEL, WHAT IS NOT. — Where a newspaper proprietor publishes a libel without any inquiry and without any knowledge on the subject, it is no defense for him to show that the article was telegraphed to him by a correspondent who had heard the matter stated in the article; his correspondent is not his agent in the sense that the correspondent's information was his information.

EVIDENCE OF FACT OF WHICH DEFENDANT HAD NO KNOWLEDGE NOT AVAILABLE IN MITIGATION OF DAMAGES WHEN. — In an action for libel, the defendant is not entitled to the benefit of evidence of a fact of which he had no knowledge at the time of the publication of the libel, in mitigation of damages.

ACTION for libel. The opinion states the case.

Cassius C. Davy, for the appellant.

Raines Brothers, for the respondent.

EARL, J. On the twentieth day of October, 1884, the defendant was a corporation and published, in the city of New York, a newspaper called the Morning Journal, and the plaintiff was a resident of Rochester. On that day the following article appeared in that paper:—

“REFUSES TO BE RECONCILED.

“*A Rochester Society Belle Who Insists upon being Married.*

“[Special to the Morning Journal.]

“ROCHESTER, N. Y., Oct. 19.

“Upper tendom is highly excited over a threatened breach of promise suit against John E. Morey, Jr., a stockholder in the Union and Advertiser, and prominent in society circles. A prominent society belle will be plaintiff in the action. Morey and his friends are moving to effect a reconciliation, but the young lady insists on his marrying her.”

The plaintiff, claiming that the publication was libelous, brought this action to recover damages on account thereof, and recovered a judgment which has been affirmed at the general term. The defendant claims that the article is not libelous *per se*, and as no special damages were alleged or proved, contends that the plaintiff should have been nonsuited.

There can be no doubt that the publication is libelous *per se*. Its tendency was to disgrace the plaintiff, and bring him into ridicule and contempt: 2 Colby's Crim. Law, 57; Starkie on Libel and Slander, 2d Eng. ed., 166, 168; Moak's Underhill on Torts, 199; Townshend on Slander and Libel, sec. 21; *Cropp v. Tilney*, 3 Salk. 225; *Villers v. Monsley*, 2 Wils. 403; *Shelby v. Sun Printing & P. Ass'n*, 38 Hun, 474; 109 N. Y. 611; *Moore v. Francis*, 121 N. Y. 199; 18 Am. St. Rep. 810.

At the trial, the defendant objected to proof of the nature of the plaintiff's business, and that he was a married man. This proof was competent, not to show special damage, as none was alleged, but to show the circumstances surrounding the plaintiff, and as bearing upon the hurtful tendency of the libel, and the general damage to which he was exposed.

The article was sent by telegraph to the Morning Journal by its Rochester correspondent, and on the trial the defendant offered to show by him, substantially, that he had heard that the breach of promise suit had been commenced against the plaintiff, and how and where he obtained the information. This evidence was excluded by the trial judge, because the defendant did not have any information on the subject at the time of the publication. It published the libelous article

without any inquiry and without any knowledge on the subject, and hence it was not entitled to the evidence for any purpose. The evidence had no bearing upon its good faith, and could not be used to rebut malice or to mitigate the damages. It received the libelous article from its correspondent, who was not its agent in the sense that his act was its act, and his information its information, and it could receive no advantage from the fact that he was imposed on or innocently mistaken.

The defendant also offered to prove that an action for breach of promise of marriage was actually commenced against one John E. Morey, not the plaintiff, and that the Rochester correspondent had heard of the suit before sending the article to it for publication, and this evidence was excluded upon the same ground; and for the same reasons we think there was no error in the exclusion. The defendant cannot have the benefit of such a fact in mitigation of damages of which it had no knowledge.

For these reasons, and others more fully stated in the able opinion in the court below, the judgment should be affirmed, with costs

NEWSPAPER LIBEL. — For a thorough discussion of the law as applicable to newspaper libel, see extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369; *Park v. Detroit Free Press Co.*, 72 Mich. 560; 16 Am. St. Rep. 544.

LIBEL. — As to when special damages need not be averred in a declaration for libel, see *Price v. Conway*, 134 Pa. St. 340; 19 Am. St. Rep. 704, and note

PEOPLE v. MORAN.

[123 NEW YORK, 254.]

ATTEMPT TO COMMIT CRIME, WHAT CONSTITUTES. — Under a statute making an attempt to commit a crime punishable, and defining such attempt as "an act done with intent to commit a crime, and tending but failing to effect its commission," the question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. Whenever the *animo furandi* exists, followed by acts apparently affording a prospect of success, and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute, although for some cause not previously apparent to him the crime was at the time incapable of accomplishment by him. And therefore, upon the trial of an indictment for an attempt to commit larceny, evidence that the accused was seen, while moving around among a

crowd of people, to thrust his hand into the pocket of a woman and to withdraw it therefrom empty is sufficient to sustain a verdict finding the accused guilty of the offense charged, although, owing to the fact of the woman having become lost in the crowd, there was no evidence that she had at the time any property in her pocket which could be the subject of larceny.

PROVISION OF NEW YORK CONSOLIDATION ACT, SECTION 1474, WAS REPEALED by the subsequent adoption of the Penal Code, as being inconsistent therewith.

INDICTMENT for attempt to commit grand larceny in the second degree. The opinion states the case.

William Travers Jerome, for the appellant.

W. H. Hewson, for the respondent.

RUGER, C. J. The indictment in this case charged the defendant with an attempt to commit the crime of grand larceny in the second degree, by attempting to steal, take, and carry away from the person of an unknown woman, in the daytime, in the city and county of New York, certain goods, chattels, and personal property of a kind and description unknown, and of the alleged value of ten dollars. It is claimed that the evidence did not show an attempt to commit a larceny. The crime of grand larceny in the second degree is defined by section 531 of the Penal Code, among others, as that of a person who, under circumstances not amounting to grand larceny, steals and unlawfully appropriates property of any value by taking the same from the person of another. A person who unsuccessfully attempts to commit a crime is made punishable by section 686 of the same code. Section 34 defines an attempt as "an act done with intent to commit a crime, and tending but failing to effect its commission."

I have thus brought together the several statutes bearing directly upon the question involved in this appeal, for the purpose of exhibiting the clearness and directness of the provisions affecting the point to be determined. The evidence given upon the trial showed that the defendant, accompanied by two associates, was observed passing around among the people gathered in a crowded market in New York, and was seen to thrust his hand into the pocket of a woman and to withdraw it therefrom empty. Upon being approached by an officer, the defendant's companions escaped, but the defendant was arrested. The woman became lost in the crowd, and was not discovered. Upon this evidence, the defendant's counsel asked the court to direct a verdict for the defendant upon the ground

that the facts proved did not support the charge in the indictment. The request was denied, and the defendant excepted. This exception presents the only question raised in the case, and depends for its solution upon the construction to be given to section 34 of the Penal Code. The claim of the defendant is, that the evidence did not show that the woman had any property in her pocket which could be the subject of larceny, and that an attempt to commit that crime could not be predicated of a condition which rendered its commission impossible. We are of the opinion that the evidence was sufficient to authorize the jury to find the accused guilty of the offense charged. It was plainly inferable from it that an intent to commit larceny from the person existed, and that the defendant did an act tending to effect its commission, although the effort failed. The language of the statute seems to us too plain to admit of doubt, and was intended to reach cases where an intent to commit a crime, and an effort to perpetrate it, although ineffectual, co-existed. Whenever the *animo furandi* exists, followed by acts apparently affording a prospect of success and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. To constitute the crime charged there must be a person from whom the property may be taken, an intent to take it against the will of the owner, and some act performed tending to accomplish it; and when these things concur, the crime has, we think, been committed, whether property could in fact have been stolen or not. In such cases the accused has done his utmost to effect the commission of the crime, but fails to accomplish it for some cause not previously apparent to him. The question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design: *People v. Lawton*, 56 Barb. 126; *McDermott v. People*, 5 Park. Cr. 104; *Mackesey v. People*, 6 Park. Cr. 114; *Am. & Eng. Ency. of Law*, tit. Attempt.

So far as the thief is concerned, the felonious design and action are then just as complete as though the crime could have been, or in fact had been, committed, and the punishment of such offender is just as essential to the protection of the public as of one whose designs have been successful. In the language of Bouvier's Law Dictionary, an attempt is an endeavor to do an act carried beyond mere preparation, but falling short of execution. Some conflict has been observed in English au-

thorities on this subject, and it may be conceded that the weight of authority in that country is in favor of the proposition that a person cannot be convicted of an attempt to steal from the pocket without proof that there was something in the pocket to steal: *Regina v. McPherson*, Dears. & B. C. C. 197; *Regina v. Collins*, Leigh & C. 471. The cases in England, however, are not uniform on this subject, and the principle involved in the cases above cited was, we think, otherwise stated in *Regina v. Goodall*, 2 Cox C. C. 40, where an attempt to commit a miscarriage was held to have been perpetrated on the body of a woman who was not at the time pregnant: *Regina v. Goodchild*, 2 Car. & K. 293. In this country, however, the courts have uniformly refused to follow the cases of *Regina v. McPherson*, Dears. & B. C. C. 197, and *Regina v. Collins*, Leigh & C. 471, and have adopted the more logical and rational rule, that an attempt to commit a crime may be effectual, although, for some reason undiscoverable by the intending perpetrator, the crime, under existing circumstances, may be incapable of accomplishment. It would seem to be quite absurd to hold that an attempt to steal property from a person could not be predicated of a case where that person had secretly and suddenly removed the contents of one pocket to another, and thus frustrated the attempt, or had so guarded his property that it could not be detached from his person. An attempt is made when an opportunity occurs and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle or condition. Many efforts have been made to reach the north pole, but none have thus far succeeded; and many have grappled with the theory of perpetual motion without success, possibly from the fact of its non-existence; but can it be said, in either case, that the attempt was not made?

It was well stated by Justice Gray, in *Commonwealth v. Jacobs*, 9 Allen, 274, that "whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it criminally, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance."

The precise question here involved, under a similar statute,

was considered in the case of *Commonwealth v. McDonald*, 5 Cush. 365, where it was held that a person "may make an attempt, an experiment, to pick a pocket by thrusting his hand into it, and not succeed because there happens to be nothing in the pocket, still he has clearly made the attempt and done the act towards the commission of the offense." The case of *People v. Jones*, 46 Mich. 441, is also in point. There the accused thrust his hand into the outside cloak pocket of a woman, but there was nothing in the pocket. It was held that the defendant was well convicted of the crime of attempting to commit larceny. The same question, under circumstances almost identical with those existing in this case, arose in *State v. Wilson*, 30 Conn. 500, and the court there said: "The perpetration of the crime was legally possible, the persons in a situation to do it, the intent clear, and the act adapted to the successful perpetration of it; and whether there was or not property in the pocket was an extrinsic fact, not essential to constitute the attempt." In *Clark v. State*, 86 Tenn. 511, the question was also considered, and it was held, where the proof showed that the defendant had opened the money-drawer of one Peebles, that a charge to the jury stating if the defendant's "purpose was to steal when he opened the drawer, and his opening it was a part of the act designed by him for getting possession of the prosecutor's money, he would be guilty of an attempt to commit larceny, even though at that particular time there was no money in the cash-drawer," was correct. The case of *Regina v. Collins*, Leigh & C. 471, was there considered and disapproved.

There are numerous other cases in this country analogous to those above cited in which it has been held that an intent to commit a crime might be predicated of a condition which rendered it impossible for the crime to have been in fact committed. Among them is the case of *State v. Beal*, 37 Ohio St. 108, 41 Am. Rep. 490, where the defendant was indicted for the crime of burglariously entering into the warehouse of William Houts, with intent to steal and take away his property. It was held, the burglarious entrance having been shown, that the defendant could be convicted, although it was proven that the warehouse did not contain any property capable of being stolen. In *Rogers v. Commonwealth*, 5 Serg. & R. 463, the indictment charged that the defendant, with intent feloniously to steal and carry away the money of one Earle from his person, put his hand into the pocket of the coat

of said Earle. The court, overruling certain exceptions to the indictment, said: "The intention of the person was to pick the pocket of Earle of whatever he found in it, and although there might be nothing in the pocket, the intention to steal is the same; he had no particular intention to steal any particular article, for he might not know what was in it." To a similar effect are the cases of *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 22; *People v. Bush*, 4 Hill, 134; and *People v. Lawton*, 56 Barb. 126.

The elementary writers in this country have uniformly stated the rule as illustrated by the cases cited, and disapproved the English cases of *Regina v. McPherson*, Dears. & B. C. C. 197, and *Regina v. Collins*, Leigh & C. 471; Bishop's Crim. Law, sec. 741; Wharton's Crim. Law, sec. 186.

The uniformity and number of the cases cited constitute a weight of authority upon the question involved that might well induce hesitation in any court, even if otherwise inclined, before pronouncing a contrary opinion; but we not only recognize their force as authority, but also approve of the reasoning by which the conclusions reached have been attained. The general term, however, determined, by a divided court, that a distinction existed between an intent to commit a crime and an attempt to commit it, and that the intent might exist although the crime was, under the circumstances, impossible of commission, while an attempt could not be predicated of any act tending to its perpetration, unless the condition was such as to render its commission then possible. This conclusion was mainly reached by a consideration of the history of legislation on the subject in this state, and an inference drawn therefrom that the law-making power had theretofore recognized a distinction between "attempts" and an "intent," as affected by the possibility or impossibility of accomplishing the crime intended. Upon that assumption, they have given a construction to section 34 of the Penal Code which materially circumscribes its plain meaning and effect.

If the premises assumed by the general term are correct, it cannot be denied but that the argument made has some force; but a careful consideration of the statutes referred to leads us to a different conclusion in relation to the weight of the legislative interpretation referred to. By the Revised Statutes, the crime of grand larceny was defined to be "the felonious taking and carrying away the personal property of another of the value of more than twenty-five dollars": Sec. 63, art. 3, tit. 3,

c. 1, pt. 4; and an attempt to commit a crime, "as the doing of any act towards the commission of such offense, but failing in the perpetration thereof, or being prevented or interrupted in executing the same": Sec. 3. tit. 7, c. 1, pt. 4. Under this act it was held that a person who had procured certain combustibles, and solicited another to use them and fire the buildings of another, was properly convicted of the offense of attempting to commit a crime, although the person solicited never intended to commit the crime, the court saying: "The offense, then, is fully made out; for the intent to do the wrongful act, coupled with the overt acts towards its commission, constitutes the attempt spoken of by the statute": *McDermott v. People*, 5 Park. Cr. 104. To the same effect was *Mackesey v. People*, 6 Park. Cr. 114, and *People v. Lawton*, 56 Barb. 126.

In this condition of the law, the legislature enacted chapter 508 of the Laws of 1860, applicable to the city and county of New York alone, which contained the following sections: —

"Sec. 33. Whenever any larceny shall be committed in said city and county by stealing, taking, and carrying away from the person of another, the offender may be punished as for grand larceny, although the value of the property taken may be less than twenty-five dollars. Attempts, under similar circumstances, may be punished as for attempts to commit grand larceny.

"Sec. 34. Every person who shall lay hand upon the person of another, or upon the clothing upon the person of another, in said city and county, under such circumstances as shall not amount to an attempt to rob or an attempt to commit grand larceny, shall be deemed guilty of an assault with intent to steal, and shall be punished as is now provided by law for the punishment of misdemeanors. It shall not be necessary to allege or prove, in prosecution for an offense under this section, any article intended to be stolen, or the value thereof, or the name of the person so assaulted."

In 1862 the above sections were re-enacted by sections 2 and 3 of chapter 374 of the laws of that year, and made applicable to the whole state, and, as a later act covering the whole subject, undoubtedly superseded sections 34 and 34 of the act of 1860. It will be seen that the main feature of these provisions was to make the offense of stealing from the person grand larceny, independent of the value of the property taken, or the time or place when the attempt was made. In the Con-

olidation Act of 1882, passed July 1, 1882, sections 33 and 34 of the act of 1860 were re-enacted as a part of the charter of the city of New York. The legal effect of this re-enactment was not very important, since that city was already subject to the provisions of the act of 1862, which provided for the same offenses, and it would seem to have had no other office to perform than to bring together in one act the various special provisions of law relating to crimes in such city. This act had little effect as a legislative interpretation, inasmuch as it was intended merely as a codification of existing criminal laws affecting the city of New York, and was immediately superseded by the enactment of the Penal Code: *People v. Jaehne*, 103 N. Y. 182.

In 1885, by chapter 524 of the laws of that year, the legislature passed an act requiring the attorney-general to prepare and report a bill to repeal the statutes superseded by the Penal Code and Code of Criminal Procedure, and in pursuance of this direction chapter 593 of the Laws of 1886 was reported to the legislature, and passed by it. This chapter provided for the repeal of a large number of statutes, among which were chapter 508 of the Laws of 1860, and chapter 374 of the Laws of 1862. In the consideration of the questions involved, it must be borne in mind that the question to be determined is as to the meaning and effect of section 34 of the Penal Code, and that must be done by considering the intent of its authors. This code is the latest statute on the subject, and whatever its requirements, if they are expressed in plain and unambiguous language, are not subject to any rule of construction which tends to subvert its plain meaning and effect: *People v. Jaehne*, 103 N. Y. 182. Assuming that the legislature of 1862 supposed an attempt to commit a crime was not predicable of a condition which did not permit of its accomplishment, and thought a special law necessary to reach such cases, it would not necessarily follow that the legislature of 1881 entertained the same views. The design in 1881 was to codify the criminal laws of the state, and embrace them all in a single enactment under a uniform system, and it must be assumed that the authors of the criminal legislation of that year had considered the existing laws on the subject, and had omitted only such provisions thereof as they deemed superseded by the proposed code, or as was otherwise repealed. We think it must be held, under the doctrine of the *Jaehne* case, that section 1447 of the Consolidation Act was repealed by the

subsequent adoption of the Penal Code, as being inconsistent therewith.

In reviewing these statutes it seems difficult to resist the conclusion that the legislature of 1862 assumed there were cases of an attempt to steal from the person, which were not covered by the existing law on the subject. The court below have assumed that the only difference discoverable was the alleged fact that in the case of an attempt to commit a crime there must be a possibility of committing it, to warrant a conviction, and that section 3 of chapter 374 of the Laws of 1862 was intended to create the minor offense of an assault with intent to steal from the person, to cover such cases. Upon these assumptions the court has inferred a legislative interpretation of the then existing law, which it has extended to govern the interpretation of the Penal Code subsequently enacted. Some force must, undoubtedly, be given to the views expressed; but we think they are much weakened by a consideration of the conditions of the pre-existing law and the subsequent legislative interpretation.

We have been unable to find any authority in this state for the assumption that an attempt to commit larceny previous to 1862 was not punishable under the Revised Statutes, whether commission of the crime was possible or not. On the contrary, the cases of *People v. Lawton*, 56 Barb. 126, *McDermott v. People*, 5 Park. Cr. 104, and of *Mackesey v. People*, 6 Park. Cr. 114, heretofore cited, clearly hold that to convict of an attempt to commit a crime it is necessary to prove only an attempt to commit it, and the doing some act tending to its perpetration. So that, whatever may have been the views of the legislature of 1862, they had no support in the condition of the pre-existing law. If we refer to the subsequent legislation, we shall find most positive proof of the sense of the legislature as to the impropriety and uselessness of section 3 of the act of 1862. In the enactment of the Penal Code, section 2 of the act of 1862 was re-enacted, while section 3 was wholly omitted. This omission in a codification of the criminal laws of the state is entirely unexplainable, except upon the theory that in the minds of the law-makers that section was unnecessary, because it was covered by other sections of the code. This view is further confirmed by the action of the legislature of 1886, which wholly repealed chapters 508 and 374 of the Laws of 1860 and 1862, upon the ground that they were superseded by the provisions of the Penal Code.

Whatever, therefore, might have been the views of the legislature of 1862 on this subject, we think they have been quite nullified and discredited by the later expressions of the legislative will. It adds much to the force of the views expressed that they will cause the law in the city of New York to conform to that prevailing in other parts of the state, and avoid the unseemly spectacle of unequal punishments for the same offense in different parts of the same jurisdiction: *People v. Jaehne*, 103 N. Y. 182.

The order of the general term should be reversed, and the judgment of the court of general sessions affirmed.

CRIME OF ATTEMPTING TO COMMIT A CRIME. — It is difficult to give an accurate and comprehensive definition of the word "attempt," as used in criminal jurisprudence: *People v. Stiles*, 75 Cal. 570, 575; 1 Bishop's Crim. Law, sec. 725; 1 Roscoe's Crim. Ev. 312. Stephen gives this definition: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted": Stephen's Dig. Crim. Law, 33. In the American and English Encyclopædia of Law it is thus defined: "Attempt — An effort or endeavor; an act tending towards the accomplishment of a purpose, which exceeds a mere intent or design and falls short of an execution of it." These definitions, while, perhaps, correct enough as far as they go, are not very specific, nor do they afford much aid in determining whether or not a party has been, in a particular case, guilty of the offense known in the criminal law as an attempt to commit a crime.

ATTEMPT IMPLIES MORE THAN MERE INTENTION. — An attempt to commit a crime involves a guilty intent, but it also implies something more than a mere intention to commit the crime. The law will not punish a criminal intent, until some overt act is done in the endeavor to carry out the previously formed intention. And this act must be such an intentional preparatory act as will apparently result, unless extrinsically hindered, in a crime, which it was designed to effect: *Gray v. State*, 63 Ala. 66; *State v. Wilson*, 30 Conn. 500; *Cunningham v. State*, 49 Miss. 685; *State v. Jordan*, 75 N. C. 27; *State v. Colvin*, 90 N. C. 717; *Smith v. Commonwealth*, 54 Pa. St. 209; 93 Am. Dec. 686; *Hicks v. Commonwealth*, 86 Va. 223; 19 Am. St. Rep. 891; *State v. Baller*, 26 W. Va. 90; 53 Am. Rep. 66. Stone, J., in delivering the opinion of the court in *Gray v. State*, 63 Ala. 73, said: "An attempt implies more than an intention formed. Some step towards consummation must be taken before the intention becomes an attempt." And in *Hicks v. Commonwealth*, 86 Va. 223, 19 Am. St. Rep. 891, Lewis, P., delivering the opinion of the majority of the court, said: "The act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation."

But the overt act done need not be the last proximate act prior to the consummation of the criminal act attempted to be perpetrated: *McDade v. People*, 29 Mich. 50; *Uhl v. Commonwealth*, 6 Gratt. 706; *Hicks v. Commonwealth*, 86 Va. 223; 19 Am. St. Rep. 891.

PREPARATORY ACT IS NOT AN ATTEMPT. — Mere preliminary preparations are not such overt acts as are required to constitute an attempt to commit a

crime. Preparations, unless put in such a shape as, by the usual course of events, to produce the consequence in question, are not attempts in a legal sense: *People v. Murray*, 14 Cal. 159; *People v. Stiles*, 75 Cal. 570; *Simple v. State*, 46 N. J. L. 197; *Hicks v. Commonwealth*, 86 Va. 223; 19 Am. St. Rep. 891; *United States v. Stephens*, 8 Saw. 116; 1 Wharton's Crim. Law, sec. 178; *Regina v. Cheeseman*, Leigh & C. 140. In *People v. Murray*, 14 Cal. 159, Field, C. J., in delivering the opinion of the court, said: "Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made." And Blackburn, J., in *Regina v. Cheeseman*, Leigh & C. 140, said: "There is, no doubt, a difference between the preparation antecedent to an offense and the actual attempt. But if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime."

OFFENSE, WHEN COMPLETE. — If a party intends to do an act which constitutes a substantive crime, and proceeds in its commission until he is interrupted by some unforeseen impediment or lack outside of himself, special to the particular case, and not open to observation, he commits the indictable offense: 1 Bishop's Crim. Law, 7th ed., sec. 742; *State v. Wilson*, 30 Conn. 500. And whenever the law makes one step toward the accomplishment of an unlawful act, with the intention of committing it, criminal, the person taking that step with that intention, and capable of doing every act on his part to accomplish that object, cannot protect himself by showing that by reason of some fact unknown at the time to him it could not have been carried into effect: *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 22; *Commonwealth v. Jacobs*, 9 Allen, 274. An examination of some of the cases in which it has been held that the overt act proceeded far enough to constitute an attempt in law will assist in elucidating the general principles already stated. In *Regina v. Roberts*, Dears. C. C. 539, it was held that the procuring of dies with which to make counterfeit coin is an act in furtherance of the criminal purpose sufficiently proximate to the offense and sufficiently showing the criminal intent to support an indictment for an attempt. In *Regina v. Cheeseman*, Leigh & C. 140, the defendant, being intrusted by his master with some meat to weigh and deliver to a customer, by means of a false weight kept back part of the meat, intending to steal it, but before he had moved away with it the fraud was discovered, and he was arrested, tried, and convicted, and the conviction was held to be right. In *Regina v. Ball*, Car. & M. 249, the prisoner went into a pawn-broker's shop with some thimbles, which he threw upon the counter, saying he wanted five shillings on them. The pawn-broker's assistant asked him if they were silver, to which he replied that they were. The assistant, upon testing the thimbles, found that they were not silver, and he gave the prisoner no money on them, but had him arrested. The prisoner was found guilty of an attempt to obtain money under false pretenses, and the conviction was upheld. In *Regina v. Ransford*, 13 Cox C. C. 9, it was held that the sending of a letter to a boy at school with intent to move and incite him to attempt to commit an unnatural offense is an offense for which the sender of the letter may be convicted, although the boy did not read the letter, and was not in any way made acquainted with its contents. In *Regina v. Goodman*, 22 U. C. C. P. 338, one W., under the direction of the prisoner, after so arranging a blanket saturated with petroleum that if a flame were communicated to it, the build-

ing would have caught fire, lighted a match, held it until it was burning well, and then put it down to within an inch or two of the blanket, when the match went out, the flame not having touched the blanket. He did not renew the attempt. It was held that the prisoner was rightly convicted of an attempt to commit arson. In *Lewis v. State*, 35 Ala. 380, Stone, J., delivering the opinion of the court, said: "If Lewis, the slave, actually intended and attempted carnally to know the prosecutrix, by violence and against her consent, and prosecuted his purpose so far as to put her in terror, and render flight necessary to escape from his wicked attempt, then he was guilty of an attempt to commit a rape." In that case the prisoner ran after the prosecutrix as she was traveling along a road which ran through a wood, called after her to stop, and pursued her until she came in view of a house, when he stopped, and she escaped without his overtaking her. In *People v. Stiles*, 75 Cal. 570, the defendant had a dynamite bomb prepared at his house in the evening, and early the next morning started with it in his pocket to meet an accomplice at an agreed place, to go and put it on a street-railway track. On his way to the place of meeting he became aware that the police were watching him, and he threw the bag containing the bomb into a garden, and ran off, but was pursued by the police and arrested. These facts were held to be sufficient evidence of an attempt. In *Griffin v. State*, 26 Ga. 493, it was held that the taking of an impression of the key of a door to a storehouse, for the purpose of making or procuring a false key, with the intention of entering the house and stealing therefrom, is an attempt to commit larceny. In *People v. Lawton*, 56 Barb. 126, the prisoner went to a building for the purpose of committing a burglary, but finding that the tools which he had with him were not strong enough to force open the door, he went to a neighboring shop to get stronger implements. Before he returned an alarm was raised which frightened him away. The evidence was held sufficient to justify a conviction for an attempt. In *Muckesry v. People*, 6 Park. Cr. 114, the defendant gave matches to another, and hired him to set fire to a shop, and the latter set fire to the shop in the defendant's absence, but the fire was put out before the store or the goods were burned. It was held that the defendant was rightly convicted of an attempt to burn the shop and goods with intent to prejudice the insurer. In the case of *Glover v. Commonwealth*, Va. Ct. of App., Nov., 1889, evidence that the defendant offered an apple to the prosecutrix, a girl under twelve years of age, if she would go into a stable with him; that he led her into the stable, pulled up her clothes, and got on her; that shortly afterwards they were seen lying down with the defendant on top of the prosecutrix, with the private parts of both exposed, — was held to justify a conviction for an attempt to commit rape, although it was afterwards proved that there had been no penetration. In *State v. Elick*, 7 Jones, 68, the defendant attempted to commit a rape, but was scared off by the arrival of help, and it was held that he was rightly convicted. And in *State v. Beeler*, 1 Brev. 452, it was held that the staking of false money at gaming is an attempt to pass it.

OFFENSE, WHEN NOT COMPLETE. — In *Taylor v. State*, 50 Ga. 79, the defendant entered a house of one room, where the prosecutrix, her father, mother, and two sisters were sleeping, turned down the bed-clothes from the prosecutrix, and put his hand on the lower part of her person, but upon her giving the alarm, instantly fled. It was held that he was entitled to a charge to the effect that if he went there with intent to desist as soon as he found out that she would not consent, he was not guilty of the charge of an assault with intent to commit rape. In *Mulligan v. People*, 5 Park. Cr. 105, it was

held that a conviction for an attempt to discharge a pistol, under the New York statute, cannot be had, where the prisoner proceeded no further than to raise and point the pistol, uncocked, at the party threatened. And in *Stabler v. Commonwealth*, 95 Pa. St. 318, 40 Am. Rep. 653, it was held that merely delivering poison to one person, and asking him to put it in the spring of a certain other person, is not an attempt to administer poison.

ATTEMPT MAY BE COMMITTED, THOUGH CRIME ATTEMPTED COULD NOT HAVE BEEN COMMITTED. — It is a general principle that where an intended criminal result is not accomplished simply because of an obstruction in the way, or because of the want of the thing to be operated upon, when the impediment is of a nature to be unknown to the offender, who used what seemed to be appropriate means, the criminal attempt is committed: 1 Bishop's *Crim. Law*, sec. 752; 1 Wharton's *Crim. Law*, sec. 186; *State v. Wilson*, 30 Conn. 500; *Kunkle v. State*, 32 Ind. 220; *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 22; *Commonwealth v. McDonald*, 5 Cush. 365; *Commonwealth v. Jacobs*, 9 Allen, 274; *People v. Jones*, 46 Mich. 441; *State v. Beal*, 37 Ohio St. 108; 41 Am. Rep. 490; *Clark v. State*, 86 Tenn. 511. *Contra*, *Regina v. Collins*, Leigh & C. 471; *Regina v. McPherson*, Dears. & B. 197.

Thus an attempt to pick one's pocket, or to steal from his person, when he has nothing in his pocket or on his person, is as much an offense as if he had: *State v. Wilson*, 30 Conn. 500; *Commonwealth v. McDonald*, 5 Cush. 365; *People v. Jones*, 46 Mich. 441. And a party may be convicted for attempting to steal from a money-drawer, although there was no money in it to be stolen: *Clark v. State*, 86 Tenn. 511. Opposed to these cases are the English cases of *Regina v. Collins*, Leigh & C. 471, and *Regina v. McPherson*, Dears. & B. 197. But neither the American judges nor text-writers approve the doctrine of these cases, and it is very doubtful if even in England they would be regarded as of binding authority.

WHETHER SOLICITATION IS AN ATTEMPT. — The question whether or not a solicitation to commit an offense is in itself an attempt to commit the offense is one upon which the authorities are not agreed. The weight of American authority seems to hold that, except where solicitation is made a substantive offense, the mere act of soliciting another to commit a crime is not, in legal effect, an attempt to commit that crime: 1 Wharton's *Crim. Law*, sec. 179; *Cox v. People*, 82 Ill. 191; *Lamb v. State*, 67 Md. 524; *McDade v. People*, 29 Mich. 50; *McDermott v. People*, 5 Park. C. C. 102; *Smith v. Commonwealth*, 54 Pa. St. 209; 93 Am. Dec. 686; *Stabler v. Commonwealth*, 95 Pa. St. 318; 40 Am. Rep. 653; *Hicks v. Commonwealth*, 86 Va. 223; 19 Am. St. Rep. 891; *State v. Baller*, 26 W. Va. 90; 53 Am. Rep. 66. Wharton says: "The better opinion is, that where the solicitation is not in itself a substantive offense, or where there has been no progress made towards the consummation of the independent offense attempted, the question whether the solicitation is by itself the subject of penal prosecution must be answered in the negative": 1 Wharton's *Crim. Law*, sec. 179. And Green, J., in delivering the opinion of the court in *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66, said: "Except in those few cases in which the common law made solicitation to do certain acts a substantive crime, it seems to me that solicitation to commit a crime is generally not a substantive crime, and never can be properly an attempt to commit a crime." There are, however, authorities which hold that solicitation alone is an attempt: 1 Bishop's *Crim. Law*, sec. 768 c; *State v. Avery*, 7 Conn. 266; 18 Am. Dec. 105; *People v. Bush*, 4 Hill, 133; *Rex v. Higgins*, 2 East, 5; *Rex v. Phillippa*, 6 East, 464; 1 Roscoe's *Crim. Ev.* 311. And it seems to be held, generally, that solicitations, when in any way attacking

the body politic, either by way of treason, scandal, or nuisance, are indictable as independent offenses. And if the solicitation involves the employment of illegal means to effect an unlawful purpose, it may become substantively indictable: *Cox v. People*, 82 Ill. 191; 1 Wharton's Crim. Law, sec. 179.

ATTEMPT TO BRIBE. — This subject is fully considered in the note to *State v. Ellis*, 97 Am. Dec. 713.

ATTEMPT TO PROCURE AN ABORTION, where the woman is not quick with child, was held not to be indictable if made with her consent, in *State v. Cooper*, 22 N. J. L. 52; 51 Am. Dec. 248. But in *State v. Fitzgerald*, 49 Iowa, 260, it was decided that the crime of attempting to produce a miscarriage of a pregnant woman is complete if the attempt is made at any time during pregnancy. And it was also held in that case that the fact that the accused used a substance which would not produce a miscarriage would constitute no defense, if he employed it with criminal intent.

ATTEMPT TO DISCHARGE LOADED FIRE-ARMS. — In *Regina v. St. George*, 9 Car. & P. 483, the accused, intending to shoot another, put his finger on the trigger of a loaded pistol, but was prevented from pulling the trigger, and it was held that this did not constitute an attempt to discharge loaded arms "by drawing a trigger, or in any other manner," within the meaning of 1 Victoria, chapter 85, sections 3 and 4. The words "in any other manner" were held to mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off. And in *Regina v. Lewis*, 9 Car. & P. 523, the accused had a loaded blunderbuss under his coat; he said to the prosecutor, "You are a dead man," and unfolded his coat and took out the blunderbuss, but was prevented from raising it to his shoulder; the flint of the weapon was found to have dropped out. Evidence of these facts was held not to be sufficient to sustain a conviction for an attempt to discharge the fire-arm. But both these cases are doubted by Coleridge, C. J., Pollock, B., Huddleston, B., and Manisty, J., in *Regina v. Brown*, L. R. 10 Q. B. D. 381, in which it was held that the accused, who had drawn a loaded pistol from his pocket to murder the prosecutor, but before he had time to do anything further in pursuance of his purpose the pistol was taken from him, was guilty of an assault, but not of an attempt to murder. In *Rex v. Carr, Russ. & R. C.* 377, it was held that in order to constitute the offense of attempting to discharge loaded fire-arms, they must be so loaded as to be capable of doing the mischief intended.

ATTEMPT VOLUNTARILY ABANDONED. — If an attempt is voluntarily abandoned before the act is put in process of final execution, without there being any outside cause prompting such abandonment, it may be a defense; but if a man resolves on a criminal enterprise, and proceeds so far in it that his acts amount to an indictable attempt, his voluntary abandonment of the evil purpose will not constitute a defense: 1 Bishop's Crim. Law, sec. 732; 1 Wharton's Crim. Law, sec. 187; *Lewis v. State*, 35 Ala. 380; *State v. Allen*, 47 Conn. 121; *Pinkard v. State*, 30 Ga. 757; *Taylor v. State*, 50 Ga. 79; *State v. Hayes*, 78 Mo. 307; *State v. Elick*, 7 Jones, 68; *Glover v. Commonwealth*, Va. Ct. of App., Nov., 1889.

CONVICTION OF ATTEMPT UNDER INDICTMENT FOR CRIME ATTEMPTED. — As an attempt to commit a crime is an inferior degree of the crime and included in it, a conviction of the attempt under an indictment for the crime will be sustained: *Regina v. Hapgood*, L. R. 1 C. C. 221; *Lewis v. State*, 30 Ala. 54; 68 Am. Dec. 113; *Usher v. Commonwealth*, 2 Duvall, 394; *People v. Lawton*, 56 Barb. 126. And an attempt to commit robbery involves an at-

tempt to commit the larceny involved in the robbery: *State v. Sommers*, 12 Mo. App. 374. But a conviction for larceny cannot be had under an indictment for attempting to commit larceny: *State v. Womack*, 31 La. Ann. 635.

ABETTORS OF ATTEMPT. — Those who aid and abet in the attempt to commit a crime may be convicted of the attempt, even though they were not present: *State v. Wilson*, 30 Conn. 500; *Uhl v. Commonwealth*, 6 Gratt. 706; *Regina v. Clayton*, 1 Car. & K. 128. But a person who stands by when an attempt is made by others to commit a rape, but who does no act to aid, assist, or abet its commission, is not guilty of an attempt to commit a rape: *People v. Woodward*, 45 Cal. 293; 13 Am. Rep. 176.

INDICTMENT FOR ATTEMPT, REQUISITES OF. — An indictment for an attempt to commit a crime should aver that the accused did some act which, directed by a particular intent, would have apparently resulted, in the ordinary and likely course of things, in a particular crime: 1 Wharton's Crim. Law, sec. 191; *Regina v. Marsh*, 1 Den. C. C. 505; *United States v. Ulrici*, 3 Dill. 532; *State v. Colvin*, 90 N. C. 717; *Clark v. State*, 86 Tenn. 511; *State v. Johnston*, 11 Tex. 22; *Commonwealth v. Clark*, 6 Gratt. 675. An indictment which simply states that the accused attempted to steal certain property, without setting out the acts done towards the perpetration of the offense, is insufficient: *Thompson v. People*, 96 Ill. 158; *State v. Brannan*, 3 Nev. 238. But in California the crime of attempt to commit burglary is defined by statute, and therefore an information which charges the offense in the words of the statute is sufficient: *People v. Murray*, 67 Cal. 103. In *State v. Angelo*, 18 Nev. 425, it was held that an indictment for an attempt to escape from the state prison, which alleged that the prisoner, while lawfully confined in the state prison, did make an overt attempt to escape, and did unlawfully, forcibly, and feloniously break out of the cell in said prison, and out of the building, contained a sufficient statement of facts to show the commission of the offense charged. But in *Hicks v. Commonwealth*, 86 Va. 223, 19 Am. St. Rep. 891, it was held that an indictment charging the defendant with attempting to poison with intent to kill a certain person, by buying the poison and delivering it to another, soliciting the latter to give it in coffee, but which failed to allege that the person to whom it was delivered consented to do so, or that anything else was done, did not charge an offense under the Virginia code. An indictment for an attempt to commit larceny from the person, which avers that the money was in the possession of the prosecutor, and upon his person, and that the accused did thrust, insert, and place his hand into the pocket of the prosecutor, sufficiently charges that the pocket was a pocket in the clothing of the prosecutor which he was wearing at the time of the attempt: *Commonwealth v. Sherman*, 105 Mass. 169. And an indictment for an attempt to commit larceny from the person which alleges that the defendant, "with intent to steal the personal property" of said individual, "being in her pocket and on her person," did "thrust, insert, put, and place his hand upon the dress near and into the pocket" of the said individual, is not equivocal, nor insufficient in precision: *Commonwealth v. Bonner*, 97 Mass. 587. In an indictment for an attempt to commit larceny it is not necessary to aver the specific articles intended to be taken: *State v. Utley*, 82 N. C. 556; *Clark v. State*, 86 Tenn. 511. In an indictment for attempting to commit a crime it is not necessary in any case to allege that the crime was actually committed: *State v. Baller*, 26 W. Va. 90; 53 Am. Rep. 66. And an information charging an attempt to commit a crime is not insufficient because it does not in terms allege that the defendant failed in the perpetration of the principal offense, or that he was prevented or intercepted in its perpetra-

tion: *State v. Decker*, 36 Kan. 717. In *Hayes v. State*, 15 Lea, 64, it was held that in an indictment for an attempt to commit larceny, the same particularity in the description of the property attempted to be stolen is not required as in an indictment for larceny. An indictment for attempting to corrupt a witness in a judicial proceeding need not aver that such witness had been sworn, recognized, or subpoenaed in such proceeding: *Chrisman v. State*, 18 Neb. 107. In *Lewis v. State*, 35 Ala. 380, it was held that an indictment for an attempt to commit rape need not aver how near to its full accomplishment the attempt had been carried; that the word "attempt" expressed the degree and extent of action performed in the alleged attempt with sufficient definiteness. In New York, it seems, the indictment need not state the particular manner in which the attempt was made: *People v. Bush*, 4 Hill, 133; *Mackesey v. People*, 6 Park. Cr. 114. In Texas an indictment for an attempt to commit rape need not allege specifically that the threats made by the accused were directed against the person of the injured female: *Reagan v. State*, 28 Tex. App. 227; 19 Am. St. Rep. 833. In Alabama an indictment for an attempt to poison must allege that the substance attempted to be administered was a poison: *Anthony v. State*, 29 Ala. 27. In an indictment for an attempt to commit burglary, the chamber of a guest at an inn must be laid as the dwelling-house of the innkeeper, and not of the guest: *Rodgers v. People*, 86 N. Y. 360; 40 Am. Rep. 548.

ATTEMPT TO COMMIT CRIME MISDEMEANOR AT COMMON LAW. — At common law, every attempt to commit a felony or a misdemeanor is in itself a misdemeanor: 1 Bishop's Crim. Law, sec. 759; 1 Wharton's Crim. Law, sec. 173; 1 Roscoe's Crim. Ev., 311; *Regina v. Ransford*, 13 Cox C. C. 9; *Usher v. Commonwealth*, 2 Duvall, 394; *State v. Jordan*, 75 N. C. 27; *State v. Stagle*, 82 N. C. 653; *Smith v. Commonwealth*, 54 Pa. St. 209; 93 Am. Dec. 686. But in *Whitesides v. State*, 11 Lea, 474, it was held that a mere attempt to commit a statutory misdemeanor was not indictable.

PUNISHMENT FOR ATTEMPT. — Where the law provides that an attempt to commit a crime is punishable by one half the penalty that is inflicted for the perpetration of the crime attempted, the party convicted of an attempt may be punished by one half the maximum penalty for the principal crime: *Ex parte Hope*, 59 Cal. 423; *Mackay v. People*, 1 Park. Cr. 459. But a sentence exceeding that limit is void: *O'Neil v. People*, 15 Mich. 275.

ATTEMPT TO RAPE DIFFERENT FROM RAPE OR ASSAULT WITH INTENT TO RAPE. — An attempt to rape is an offense distinct from rape or an assault with intent to rape, and comprehends elements different from those which combine to constitute either of those offenses: *Mellon v. State*, 24 Tex. App. 284; *Reagan v. State*, 28 Tex. App. 227; 19 Am. St. Rep. 833. An attempt to commit rape may be established by proof of threats, but an assault with intent to commit rape cannot: *Burney v. State*, 21 Tex. App. 565; *Taylor v. State*, 22 Tex. App. 529. And under the Texas code the offense of attempt to commit rape may be perpetrated on a child under ten years of age, even with her consent, and without force, threats, or fraud: *Mayo v. State*, 7 Tex. App. 342.

INTENT NECESSARY TO ATTEMPT. — To justify a conviction for an attempt to commit a crime, an intent to commit it must be proved: *Regina v. Donovan*, 4 Cox C. C. 399; *Reagan v. State*, 28 Tex. App. 227; 19 Am. St. Rep. 833. In the former of these cases, it was held that where a woman jumped out of a window to avoid the violence of her husband, and sustained dangerous bodily injuries, he could not be convicted of an attempt to murder her,

unless he intended, by his conduct, to make her jump out of the window. And in the latter case it was held that as a specific intent to ravish is an essential ingredient of the offense of attempt to rape, if the accused was too drunk for a conscious exercise of the will to the particular end, — that is, too drunk to entertain the intent, — he was not guilty. That the accused made subsequent attempts to accomplish the same purpose, by different means, is admissible in evidence to show with what intent he made the attempt charged in the indictment: *Lamb v. State*, 66 Md. 285.

ATTEMPT NOT EQUIVALENT TO INTENT. — An attempt to commit a crime is not equivalent to an intent to commit it: *Regina v. McPherson*, Dears. & B. C. C. 197; *State v. Marshall*, 14 Ala. 411. And a party cannot be convicted of an attempt to rape under an indictment for an assault with intent to rape: *Burney v. State*, 21 Tex. App. 565; *Brown v. State*, 7 Tex. App. 569; *Lewis v. State*, 35 Ala. 380. There is no such offense as an attempt to commit an assault with intent to rape: *Brown v. State*, 7 Tex. App. 569.

ATTEMPT TO COMMIT SUICIDE is not punishable in Massachusetts: *Commonwealth v. Dennis*, 105 Mass. 162.

BACON v. UNITED STATES MUTUAL ACCIDENT ASSOCIATION.

[123 NEW YORK, 301.]

ACCIDENT INSURANCE POLICY, CONSTRUCTION OF PHRASE "DIED FROM DISEASE" IN. — An accident insurance policy provided that it should not extend "to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, . . . nor to any case except where the injury is the proximate or sole cause of the disability or death." In an action on the policy it appeared that the insured died from a malignant pustule. And plaintiff's witness testified that this pustule is caused by contact with putrid or diseased animal matter; that it is an acute, infectious malady, sometimes epidemic, differing from diphtheria, small-pox, or scarlet fever, in the single fact that it has one particular germ from which it originates, namely, a particular form of bacteria transmissible to mankind; that it is "a pathological condition of the body." It was held that the insured died from disease within the meaning of the policy, and that the plaintiff could not, therefore, recover.

ACTION to recover upon an accident policy or certificate of insurance issued by the defendant. In the policy it was stipulated that "benefits under this certificate shall not extend . . . to any bodily injury happening directly or indirectly in consequence of disease; nor to any death or disability which may be caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of this certificate, . . . nor to any case except where the injury is the proximate or sole cause of the disability or death." Other facts appear from the opinion.

Winsor B. French, William B. Smith, and Richard L. Hand,
for the appellant.

George L. Stedman, for the respondent.

PECKHAM, J. I think the deceased died from disease within the meaning of the language used in the policy sued upon in this action, and not from an accident causing the disease. The disease itself was not caused by an accident within the meaning of the policy.

The case of *Paul v. Travelers Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758, has been cited by counsel for the respondent as decisive of his case. Upon the question decided the case is conclusive, and we have no disposition to alter our views as expressed therein. But upon the question of whether the deceased in this case died from disease, as above stated, the case of Paul is without the slightest analogy. In that case the deceased came to his death by accidentally inhaling illuminating gas. This gas is a manufactured article, gathered into large reservoirs, and thence distributed through pipes into almost every house in a city or village. The deceased accidentally, while asleep, inhaled this gas, and was suffocated. This would seem to be a plain case of death from accident, and it was found that the gas was not purposely inhaled. The death being the result of accident, it was then held that such death was caused by external and violent means within the meaning of the policy. This, also, seems plain enough. The gas was external, and it was not inhaled voluntarily, i. e., intentionally, and for the purpose of being killed thereby. It might naturally be said, as in effect it was, that death, as the result of accident, imports an external and violent agency as the cause. There was no question in the Paul case that the deceased came to his death through disease; no pretense could properly be made as to death from disease in such a case. If the deceased had been asleep in a room into which a large quantity of water was poured through the accidental breaking of a water-main, and in consequence thereof he had been drowned, no one would deny that the death was caused by accident, and was not the result of disease as that word is generally used among men. There is no difference in the case, in principle, if the death, instead of being caused by water, which was visible, was caused by gas, which is invisible. In neither case would the idea even suggest itself that death was caused by disease. But in the case before us the facts are entirely different.

The deceased died, as is said and as will be here conceded, from malignant pustule. It is caused, as the plaintiff's witness testified, by the infliction upon the body of a certain kind of animal substance, contact with diseased or putrid animal matter; this acts by producing, at the point of contact with this matter, a papula, something like a flea-bite, which rapidly becomes a vesicle, a blister-like affair, and then a pustule; this is accompanied by a great deal of swelling in the parts immediately around it, and a great deal of pain in the individual; the glands in the vicinity become infiltrated with blood and pus, and become dark red or even black in color; the neighboring glands become involved; then comes, almost immediately after or together with these signs, a great prostration, and the patient dies in a short time, five to eight days, generally, the extreme limits being from twenty-four hours to sixteen days; he dies of exhaustion.

As to the cause of the pustule, the witness stated that the virus comes from the hide or hair or wool of animals suffering from this disease; from their flesh sometimes, or it may come from the feathers of birds that have been feeding upon this peculiar kind of carrion; it may be communicated directly, that is, by the immediate contact of the individual with it; by his touching it or handling it and then bringing the matter in contact with the skin or thin mucous membrane; or it may be transported, as there are very many cases known, by insects, flies, mosquitoes, that have been feeding upon this, carrying it away, and depositing it upon individuals. It is commonly known as malignant pustule, or charbon, or anthrax; they are all synonymous terms. It has been called wool-sorters' disease, because it happens among people that handle wools and hides, such as tanners, butchers, and herdsmen, and those people that are engaged in business where they are brought in contact with that sort of thing.

In answer to the question, "How rare is malignant pustule?" this same witness for the plaintiff answered: "In the eastern parts of this country, it is a pretty rare; there have been some epidemics reported in America; in the eastern part of Massachusetts, I think about twenty years ago, there were quite a number of cases among the hair-workers, people that take the hair that comes from abroad and make mattresses of it."

The witness thus designates the difficulty as an epidemic, which word is so frequently used in connection with disease as almost to be synonymous therewith. It was undoubtedly so

used in this instance by the witness, who thus describes malignant pustule as a disease when referring to its frequency in Massachusetts some years ago. The word "epidemic" would scarcely be used to express a frequent occurrence of accidents. The witness also said that he has seen it termed in one standard authority as an acute infectious disease. He said that the special poison of the disease has been found to be a particular kind of bacteria, "bacillus anthrax." The following question was put to the witness: "Is it not so, that anthrax is an acute infectious malady, which breaks out commonly in an epizootic or enzootic manner, and is not infrequently sporadic in herbivorous animals and swine, and is transmissible to a great number of other animals, as well as to mankind?" The answer of the witness, after some fencing, was, "Yes; I think that is correct."

Malignant pustule differs, according to this same witness, from diphtheria, small-pox, or scarlet fever, in the single fact that this is a particularly poisonous animal matter, and it has one particular germ from which it originates, as small-pox has another, and hydrophobia another, and the cause of the difficulty in each case is some form of bacteria, transmissible to mankind. It can be contracted through eating the flesh of animals subject to the disease. The bacillus is very small, so small that it may enter in the pores of the skin, and an abrasion of the skin is not necessary, but might quicken the result. The forming of the pustule upon the skin is the product of the poison.

Another witness for the plaintiff, who was a physician, said that he understood malignant pustule to be a development of the particular bacilli in the system radiating from the point of contact. He added that the contagion might be internal as well as external, taken through the mouth or through the nose, and it is generally considered an acute infectious disease.

Both these learned gentlemen, however, refused, themselves, to designate malignant pustule as a disease.

Dr. Harris defined it as "a pathological condition and succumbing of the body to the infliction of this particular poison." Dr. Bailey says he considers it as a "pathological condition following this particular inroad of this particular kind of bacilli."

We all know that "pathology," as used generally, means that part of medicine which explains the nature of diseases, their causes and symptoms. A "pathological condition" means

neither more nor less than a diseased condition of the body. The insurance in this case was against bodily injuries effected through external, violent, and accidental means. It was not to extend "to any death or disability which may have been caused wholly or in part by bodily infirmities, or disease existing prior or subsequent to the date" of the policy, "nor to any case except where the injury is the proximate or sole cause of the disability or death." There cannot be the slightest doubt that malignant pustule is regarded generally, by those who have but the usual acquaintance with such matters, as a disease. Every particle of testimony given by the doctors called by the plaintiff shows clearly, to my mind, that it is so regarded generally in the medical world, and that it is only when these doctors are asked to define the case in a manner to suit their refined notions of scientific and artistic accuracy that they define the trouble as a "pathological condition of the body," in the one case "succumbing to infliction of this particular poison," and in the other, "following this particular inroad of this particular kind of bacilli."

The difference between the cause of this condition and the causes of typhoid fever, tuberculosis, small-pox, scarlet fever, and such like diseases, is, that this particular condition is caused by different bacilli from the others, and they come in contact with the skin or enter into its pores, while in the other cases they are generally breathed in.

But no abrasion of the skin is needed to produce the contact of the bacilli, and what follows from such contact seems to be as plainly a disease as in the case of small-pox or typhoid fever. The question, then, is, even assuming that some particular physicians refuse to call this a disease and describe it as a pathological condition, whether it is not a disease within the meaning of that term as used in this policy. Taking all the facts testified to by these physicians of the plaintiff, including their own special description of this condition of the body, and it seems to me there can be no intelligent, rational doubt that the insured died from a disease attacking him subsequent to the issuing of the policy. He did not die from any accident within the provision contained in the policy defining an accident. The definition given by the physicians for the plaintiff as to the difficulty being a pathological condition of the body, and not a disease, is upon these facts entirely too fragile to base a recovery upon, and the distinction between a disease and a pathological condition of the body is, with ref-

erence to this case, much too refined for common acceptance. It seems to me clear that the meaning of the words used in the policy covers just such a case, and that the parties never intended that a cause of death which to all outward appearances, and to the world in general, was a disease, should be converted into a "pathological condition" of the body, caused by an accident.

The judgment should be reversed, and a new trial ordered, costs to abide event.

O'BRIEN, J., delivered a dissenting opinion, of which the following is an epitome, and Ruger, C. J., also dissented. The principal question in the case is, whether the death of the insured was the result of accident or of disease, or other cause not covered by the stipulations of the parties. It is not disputed that death resulted from the effects of a malignant sore on the lip of the insured, which, soon after its appearance, involved the neighboring parts, producing septicemia and utter exhaustion. The plaintiff claimed that this sore was a malignant pustule, while the defendant claimed that it was a facial carbuncle, and therefore a disease. The court instructed the jury that if it was a carbuncle, the plaintiff could not recover, but if it was a malignant pustule, produced in the manner claimed by plaintiff, he was entitled to a verdict. The testimony of plaintiff's medical experts was, that this pustule is not a disease in the strict sense of that term, but a pathological condition of the system caused by the accidental infliction of diseased or putrid animal matter infested with bacteria or bacilli anthrax upon the thin skin of the lip, whence the bacilli multiply and are diffused through the system. The animal virus comes from the hides, hair, wool, or flesh of animals suffering from anthrax, and may be transmitted to human beings directly by the immediate contact of the individual with it, by touching or handling it, and then bringing the matter in contact with the skin or mucous membrane, or it may be carried by carrion birds or by insects, and in various other ways communicated to man and inflicted or implanted upon some exposed part of the body. The evidence in this case shows that people living in grazing regions in the southern or western portions of the United States, and required to handle hides, hair, or wool, are more exposed to malignant pustule than other persons. The deceased went to Council Bluffs on February 1, 1894, and died there in less than two months after. He was employed as a book-keeper in a meat-market, and afterwards as a clerk in the transfer department of the Union Pacific railroad, where it was shown that car-loads of hides frequently pass, and it was also shown that a large number of cattle are slaughtered in that vicinity. But there was no direct proof that the deceased ever came in immediate contact with the hides or the flesh of these animals. We must accept the verdict of the jury, that the deceased died from the effects of malignant pustule. There was evidence to warrant the finding, and this court must now deal with the case upon the principle that death was caused as claimed by the plaintiff.

Whether the malignant pustule was the result of animal virus coming in contact with the lip, or whether the sore was produced in some other way, was, perhaps, a more difficult question. But in view of the plaintiff's testimony tending to show that the infliction of this virus is the only cause of pustule, and that the insured was in some degree exposed to it, and that

death generally follows contact with it in a few days, it cannot be said that this finding is based wholly on speculation and conjecture. The jury was warranted in finding that in some way the bacilli anthrax were implanted upon the lip, and at some time within ninety days prior to the death of the insured. Assuming that death resulted as claimed by the plaintiff, the question remains, whether this was "external, violent, and accidental means" within the meaning of the contract. It has been held that the beneficiary was entitled to recover under a policy containing those words, where death resulted from breathing illuminating gas, which escaped in some way while the insured was asleep: *Paul v. Travelers Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758; in case of death by drowning: *Trew v. R. P. Ass'n*, 6 Hurl. & N. 839; *Mallory v. Travelers Ins. Co.*, 47 N. Y. 53; 7 Am. Rep. 410; and in a case where death was produced by fright: *McGlinchey v. Fidelity & C. Co.*, 80 Me. 251; 6 Am. St. Rep. 190. And the courts, both in England and in this country, have given to these words a broad and liberal interpretation in favor of the insured or the beneficiary: *United States M. A. Ass'n v. Barry*, 131 U. S. 120, 121; *North American L. & A. Ins. Co. v. Burroughs*, 69 Pa. St. 43; 8 Am. Rep. 212; *Accident Ins. Co. v. Crandall*, 120 U. S. 527; *Winspear v. Accident Ins. Co.*, L. R. 6 Q. B. D. 42; *Paul v. Travelers Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758. Guided by the principles laid down in these and other cases, and by what seems to have been the intention of the parties, he was of opinion that the court should hold, in this case, that the infliction of animal virus by some exterior force or power upon the person of the deceased, as found by the jury, was a bodily injury "effected through external, violent, and accidental means," producing death, within the intent and meaning of the policy, and that the defendant is liable. When death results from the accidental infliction of the animal virus upon the person, whether by handling the same, or deposited upon his person by insects or otherwise, as shown by the witnesses for the plaintiff, it cannot be said that the jury was bound to find that the malignant pustule was a disease within the conditions of the policy exempting the defendant from liability. The jury could have found, in view of the evidence, that the deceased lived in a locality and was engaged in employments in which he was exposed to contact with this peculiar form of poison; and it would seem that a malignant pustule, produced by the deposit upon the lip of the deceased of a particle of this animal virus, resulting in death, is as much an accident as is the case of death from breathing illuminating gas while asleep. There was evidence upon which the jury could have found that the deceased contracted the pustule in this way.

LUHRS v. LUHRS.

[123 NEW YORK, 357.]

POLICY OF LIFE INSURANCE, CHANGE OF BENEFICIARY NAMED IN. — Where the constitution and by-laws of a beneficial organization provide that a member in good standing may, upon compliance with the rules and regulations of the organization, at any time change the beneficiary named in the certificate issued by it to him, if such member surrenders to his lodge his benefit certificate, with a written request that a new certificate be issued with a different beneficiary named therein, the change of beneficiary is thereby consummated, although the member dies before the old certificate is actually canceled and a new one issued by the supreme

lodge, such lodge having no discretion to refuse to issue a new certificate in accordance with the direction of such member, upon receipt of the old one. And the subsequent issue of a new certificate will be regarded as relating back to the time of the legal surrender of the old one. An acceptance of the new certificate will also be presumed as of the same time, no acceptance thereof being required by the rules and by-laws of the organization.

ACTION to recover the amount named in a certificate of life insurance. The opinion states the case.

Daniel Cameron, for the appellant.

Alfred Steckler, for the respondent

PECKHAM, J. The facts in this case are undisputed, and are substantially as follows: John Luhrs, in the year 1881, became a member of the supreme lodge, Knights of Honor, a charitable organization of the state of Kentucky, doing business in New York state. It had a branch lodge in the city of Brooklyn, and he joined that lodge. He received a certificate from the supreme lodge, by which it was promised that if he should comply with all the rules and regulations of the supreme lodge, and should be in good standing at the time of his death, the supreme lodge would pay to such member or members of his family, or person or persons dependent upon him as he should direct or designate by name, a sum not to exceed two thousand dollars, as provided by general law. He designated his wife as the beneficiary, and the certificate which he originally received from the supreme lodge, and which was dated on the 22d of September, 1882, contained her name as such. In the constitution of the organization, it is provided that every lodge shall forward to the supreme reporter all applications for membership, and that each application shall have the name of the person to whom the benefit is to be paid inserted therein, and where more than one certificate is issued, the beneficiary named in the last shall alone be entitled to the benefit.

It is further provided in the constitution that a member desiring to change his beneficiary may, at any time while in good standing, surrender to his lodge his benefit certificate, which, together with a fee of fifty cents, shall be forwarded by the reporter of his lodge to the supreme reporter, who shall thereupon cancel the certificate and issue a new one in lieu thereof to such member, payable as he shall have directed, within the limitations prescribed by the laws of the order;

said surrender and direction to be made on the back of the benefit certificate surrendered, signed by the member and attested by the reporter of the lodge.

On the eighth day of March, 1887, while Luhrs was a member in good standing, an indorsement was made upon the certificate which had been issued to him, and which contained the name of his wife as the beneficiary, and such indorsement was in the following words: "I hereby surrender to the supreme lodge, Knights of Honor, the within benefit certificate, and direct that a new one be issued to me, payable to my sister, Anna Luhrs." At the end of this indorsement, John Luhrs signed his name. On the same day, the certificate, thus indorsed and signed, was placed in an envelope and sent to Edward Cook, who was the reporter of the Brooklyn lodge, and it was received by him on the 9th of March, and the words, "Attest: Edward Cook, Reporter," were placed, together with the seal of the lodge, on the certificate, at the end of the indorsement. The reporter, Cook, sent the certificate thus indorsed by mail to the supreme lodge at St. Louis on the morning of the 10th of March. It does not appear in the case that any claim was made upon the trial that the sister, Anna Luhrs, was not a person dependent upon her brother within the meaning of the constitution and by-laws of the organization, and I think it can be assumed that she was, and was so regarded upon the trial. She was with her brother at the time he died, and no one else was, and he died on the 10th of March, 1887.

The certificate thus forwarded to the supreme lodge at St. Louis was received at the home office on the 12th of March, and on that day it was formally canceled, and another certificate, with the name of Anna Luhrs as the beneficiary, and signed by the supreme director and the supreme reporter, was sent from the St. Louis office. At the end of the old and new certificates the words "I accept this certificate upon the condition herein named" were printed, and at the bottom of such acceptance on the old certificate John Luhrs had signed his name. Of course there was no signature of his attached to the new certificate. Nor it does appear that this written acceptance was called for by the constitution, or by any by-law of the association. The supreme lodge kept the old certificate thus canceled as the authority for the issuing of another.

After the death of John Luhrs, his sister Anna made a demand upon the supreme lodge for the payment to her of the

two thousand dollars mentioned in the second certificate. The plaintiff, the widow of the deceased, also demanded of the supreme lodge the payment of the two thousand dollars mentioned in the first certificate. The supreme lodge acknowledged an obligation to pay to one or the other of the parties, but not to both. The widow, therefore, commenced an action against the supreme lodge to recover the amount named in her certificate, and upon motion the defendant, Anna Luhrs, the sister, was substituted as defendant in place of the supreme lodge, which deposited the money in the court to await its order as to the proper disposition of such sum, and the supreme lodge was thereupon discharged from further liability in the matter. By this equitable proceeding the widow and the sister of the deceased have been brought together to litigate the question which of them has the better right to the fund in question.

Upon the trial, the court directed a verdict in favor of the defendant. Upon appeal, the general term reversed the judgment entered upon such verdict, and granted a new trial. The general term held that there had never been a valid and complete change of certificates within the lifetime of the deceased, and that, hence, the widow was entitled to the sum.

The defendant has appealed to this court from the order reversing the judgment entered in her favor and granting a new trial, and has given the usual stipulation for judgment absolute against her in case such order be affirmed.

The question is not at all one which is free from doubt, and about all that can be said in favor of either view has been said by the learned judges who have written at the special and general terms. Upon the whole, and with some hesitation, we are inclined to favor the opinion pronounced at the special term, and to hold that the sister, the beneficiary named in the new certificate, is entitled to the fund.

The deceased had expressed his desires in the premises as fully as it was possible for him to do. He had himself complied with all the requirements imposed by the supreme lodge as necessary for him to perform in order to obtain another certificate. He had directed in writing to whom he wished the certificate payable, and he had surrendered his old certificate to the authorized agent of the supreme lodge, which agent had accepted such surrender and attested it by the signature of its reporter and the seal of the lodge. The person designated as the new beneficiary was one of those mentioned in

the by-laws of the organization as a proper person to be named as such, and there was no discretion resting in the officers of the supreme lodge to refuse to issue a new certificate in accordance with the direction of the deceased upon receipt of the old one. If the old certificate had been actually surrendered into the hands of an officer of the supreme lodge, and it had been by him canceled before the death of the deceased, although the new one was not issued in accordance with his direction until after his death, would it not properly be held that the issuing of the new certificate was, under such facts, a purely formal matter, a mere written evidence of the fact which was in reality consummated by the surrender and cancellation of the old certificate?

The cancellation must follow the surrender if the surrender have been properly made, and the new certificate must issue in accordance with the directions of the member, if the beneficiary be one of that class named in the by-laws.

The question is, whether the valid and proper direction of the member shall be complied with, when he has done everything that was required of him to do in order to effectuate his intention, and all that remains to be done is a purely formal piece of business, and one in the doing of which there is not (upon the facts in this case) one particle of discretion remaining in the officers of the supreme lodge, or in any other body. Is not this written indorsement of a surrender of the certificate, and the written direction thereon to issue a new one to a new and proper beneficiary, followed by an actual and manual surrender of the old certificate to the acknowledged and authorized agent of the supreme lodge, equivalent, for the purpose of acquiring rights under the new certificate, to an actual delivery of the surrendered policy by the agent to the supreme lodge, and a formal cancellation thereof by it? May not the old one be regarded as, in law, canceled, when it is properly surrendered, by a writing to that effect, signed by the member and indorsed thereon, and the certificate itself actually placed in the custody of the authorized agent of the principal? We think, in this case, these questions may fairly be answered in the affirmative.

The supreme lodge acted upon the surrender, and did cancel the certificate, and did in fact issue the new one, as directed by the member, and does not deny the legality of the surrender, or make any claim that it was not effectual. The only trouble is, that when it formally acted in accord-

ance with the valid direction of the deceased, and did what ordinarily, upon the facts of the case, it would have been bound to do, the member was dead. We do not think that his decease should, upon these conceded facts, operate to prevent the consummation of the surrender and cancellation.

It is said that until the actual cancellation by the supreme lodge there might be a recall of such surrender by the member. Possibly there might be, but there was none in this case. After cancellation, the member might also ask for another certificate, containing the same name as the old one; in other words, the member might change his mind; but as already stated, in this case he did not.

Feeling, as we do, that the surrender of the old certificate, and the designation of a proper beneficiary in the manner and under the circumstances described in the evidence herein, amounted to a surrender and cancellation by the supreme lodge, we think the subsequent issuing of a new certificate designating a new beneficiary as directed by the member, may be held to relate back to the time of the original surrender to the agent of the supreme lodge. Although upon the face of the certificate there was this printed form, "I accept this certificate upon the condition herein named," and a place left for the signature of the member, yet it does not appear anywhere that such signature was requisite in order to show an acceptance of the certificate. An acceptance may be presumed when the certificate is issued in accordance with the direction of the member, and consequently, if the issue of such certificate can be regarded as relating back to the time of the legal surrender of the old one, the acceptance may be also presumed to have followed as of that time. The certificate, when issued, may be thus regarded as relating back, on the ground that it is merely and purely a formal act on the part of the supreme lodge, registering and giving written evidence of a transaction all the material facts of which had occurred during the lifetime of the deceased. No new rights were brought into being by the action of the supreme lodge after the death of the member, but that action simply gave the proper written evidence to the beneficiary of the existence of those rights which had, in fact, accrued before the formal issuing of such written evidence.

There is nothing in the point that the deceased, having designated his wife as the beneficiary, could not thereafter deprive her of the money due upon the policy. The contract

was one provided for by and in accordance with the constitution and by-laws of the organization, and the original certificate was issued subject thereto; and it was the undoubted law that if the rules and regulations were complied with, the beneficiary could at any time be changed by the direction of the member.

We are of the opinion that the order of the general term should be reversed, and judgment ordered upon the verdict at special term, with costs to the defendant in all courts.

MUTUAL BENEFIT ASSOCIATIONS. — For the law relating to the designation, change, and rights of beneficiaries in certificates of membership in mutual benefit societies, see extended note to *Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 786-790.

CITY OF ROCHESTER v. CAMPBELL.

[123 NEW YORK, 405.]

LOT-OWNERS IN CITY NOT BOUND TO REPAIR STREETS OR SIDEWALKS AT COMMON LAW. — No obligation to repair streets or sidewalks adjoining lots in a city rests upon the owners of such lots, at common law, but the duty to do so, if any, arises out of statutory obligations imposed upon them by the state or municipality. Such owners do not, therefore, incur any liability to individuals or municipalities for damages arising from streets rendered defective through want of repairs, where the charters of such municipalities do not assume to make the lot-owners liable to the party injured.

REMEDY FOR VIOLATION OF DUTY IMPOSED BY STATUTE IS EXCLUSIVE WHEN. — Where a new right is created or a new duty is imposed by statute, if a remedy be given by the same statute for its violation or non-performance, the remedy given is exclusive. Where, therefore, a city charter makes it the duty of the owner of every lot in the city to keep the sidewalks adjoining it in good repair, and empowers the superintendent of streets, in case of the owner's neglect, after notice to make repairs, to make them himself, and collect the expense thereof from the owner, the city cannot, in the absence of any negligence or breach of contract duty on the part of the owner, recover from him the amount of a judgment recovered against it for damages sustained by one who was injured in consequence of a defect in the sidewalk adjoining such owner's premises.

ACTION to recover the amount of a judgment recovered against and paid by the plaintiff. The opinion states the case.

Eugene Van Voorhis, for the appellants.

Henry J. Sullivan, for the respondent.

RUGER, C. J. The questions involved in this appeal are raised by a demurrer to the complaint, alleging that it does not contain facts sufficient to constitute a cause of action.

The action, as stated in the complaint, is based upon a liability alleged to have been incurred by the defendants' testator under a clause in the charter of the city of Rochester which provides that "it shall in all cases be the duty of the owner of every lot or piece of land in said city to keep the sidewalks adjoining his lot or piece of land in good repair, and also to remove and clear away all snow and ice or other obstruction from such sidewalk." It was further provided that "the superintendent of streets shall have the power to repair any sidewalk, when the owner of the property shall neglect to repair the same for five days after written notice so to do has been served on him"; and "the street superintendent shall also have the power to collect the expense of any such work or repair from the owner of the property."

The complaint alleged, in substance, that the defendants' testator was the owner of a lot on Strong Street, in the city of Rochester, and that in front of and adjoining said premises there was a sidewalk for pedestrians using said street; that it became, and was, the duty of said testator, under and by virtue of the acts relating to the city of Rochester and forming its charter, to keep said sidewalk in good repair; that the said testator omitted this duty, whereby one Margaret A. Ferguson, while walking carefully along said street and sidewalk, and without fault or negligence on her part, stepped into a hole in said sidewalk, and was thereby thrown down with great violence, and permanently hurt and injured. It was also alleged that said Margaret had brought an action against the city of Rochester for the damages occasioned to her by said injury, and recovered therein, and that the city of Rochester had paid the amount of the judgment so recovered against it. It was also alleged that the defendants' testator died before such action was commenced, and left a last will and testament whereby the defendants were appointed his executors; that such executors were notified by the city of Rochester of the pendency of the action, and requested to come in and defend the same, and that they were represented by counsel on the trial.

It will be observed that the complaint does not charge the defendants' testator with negligence, or the breach of any contract duty; but his liability is predicated wholly upon the

statutory obligation to repair, and the assumption that an omission to perform it imposes a liability in favor of all persons who may be injured by reason of such omission. The principles governing actions of this general character have been the subject of frequent consideration in the courts of this and other states, as well as the federal tribunals; and certain propositions may safely be assumed, in the further consideration of the case, as being too well settled to require argument or citation to support them. Among these are the following:—

1. That municipal corporations in this state are charged with the care, custody, and control of the streets and highways within their limits, and the duty, primarily, rests upon them to keep such streets and highways in repair, so that they may be safely traveled upon by all having occasion to use them, and this duty is based upon the contract implied through the acceptance of a charter by such corporation from the state, devolving upon them the performance of such duties: *Conrad v. Village of Ithaca*, 16 N. Y. 158; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27; 46 Am. Rep. 122.

2. That such corporations are liable for damages arising from a neglect to perform this duty, in an action *ex delicto*, to persons lawfully using such streets and sidewalks, notwithstanding a duty to repair is also imposed upon the property owners in front of whose premises the injury occurred: *Russell v. Village of Canastota*, 98 N. Y. 496; *State v. Gorham*, 37 Me. 457; *Gridley v. Bloomington*, 88 Ill. 554; 30 Am. Rep. 566; *Robbins v. City of Chicago*, 4 Wall. 657; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27; 46 Am. Rep. 122.

3. If a municipal corporation has been compelled to pay a judgment for damages recovered by a traveler for injuries sustained from a defect or obstruction in one of its highways, which defect or obstruction was created by the willful act or negligence of a third person, it may maintain an action against such third person for reimbursement; and the rule is the same when it has paid an undoubted liability without suit: *Thompson on Negligence*, 789; *City of Rochester v. Montgomery*, 72 N. Y. 65; *Village of Fulton v. Tucker*, 3 Hun, 529.

4. So, also, if the municipality has provided by contract with third persons for keeping its street in repair, and has been, through a neglect by such party to perform his contract, subjected to damages at the suit of an injured party, it may recover from such party the sum which it has thus been compelled to pay.

5. The measure of damages in such cases is the loss sustained by the injured party, and paid by the municipality, with such incidental expenses as may have been incurred in defending the action: *Thompson on Negligence*, 791; *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 476; 7 Am. Rep. 469.

6. That no obligation to repair streets or sidewalks rests upon the lot-owners at common law, but the duty to do so, if any, arises out of the statutory obligations imposed by the state or municipality upon them: *Village of Fulton v. Tucker*, 3 Hun, 529; *Dillon on Municipal Corporations*, sec. 1012.

7. When a corporation is sued for damages arising out of defects and obstructions in its streets and highways, created and continued by third persons, against whom the corporation has a cause of action for reimbursement, it may impose the burden of defending such actions upon such persons by notice, and in case they do not defend successfully, or neglect to make any defense, they are bound by the result of such suit, and cannot in any subsequent litigation between themselves and the corporation successfully dispute the material facts on which the adjudication rests: *City of Rochester v. Montgomery*, 72 N. Y. 65; *Village of Port Jervis v. First Nat. Bank of Port Jervis*, 96 N. Y. 550.

Assuming the correctness of these propositions, the question which first presents itself is, whether abutting owners incur any liability to individuals or municipalities for damages arising from streets rendered defective through want of repairs, under a charter like that in question.

The theory upon which actions have heretofore generally been sustained in favor of municipal corporations against wrong-doers for damages which they have been compelled to pay individuals injured through defects or obstructions in streets and highways is, that such corporations have succeeded, in some way, to the remedies of the injured party against the wrong-doer. Recoveries have been allowed in such cases only where the wrong-doer is responsible, generally, to all who are injured by his act; and when corporations have been compelled to pay damages for a wrongful act perpetrated by another in public highways they become entitled to maintain an action against such persons for indemnity from the liability which the wrongful act of the tort-feasor has brought upon them. In other words, the municipality, by payment, becomes practically subrogated to the cause of action against the tort-feasor

which the injured party originally had, and it can recover against such tort-feasor only by proving the injury, the negligence of the defendant, the extent of the damages, and the fact of payment by it: *City of Rochester v. Montgomery*, 72 N. Y. 65; *Village of Port Jervis v. First Nat. Bank of Port Jervis*, 96 N. Y. 550; *City of Chicago v. Robbins*, 2 Black, 418; *Robbins v. City of Chicago*, 4 Wall. 657; *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 476; 7 Am. Rep. 469.

In these cases the primary liability rested upon those who created the dangerous condition through which injury resulted, and the municipality having been forced to pay such damages to one injured, it became subrogated to the remedies of the party whose damages had been satisfied. It was held in the case of *Lowell v. Boston etc. R. R. Corp.*, 23 Pick 24, 34 Am. Dec. 33, that "if the defendants had been prosecuted instead of the town, they must have been held liable for damages, and from this liability they have been relieved by the plaintiffs. It cannot, therefore, be controverted that the plaintiffs' claim is founded in manifest equity. The defendants are bound in justice to indemnify them, so far as they have been relieved from a legal liability, and the policy of the law does not, in this instance, interfere with the claim of justice."

It is therefore essential, in this case, for the plaintiff to establish the original liability of the defendants' testator for the injuries inflicted to the party injured, and if it fails to do this, it must necessarily fail in the action. This is attempted to be done through the provisions of the charter. That statute, however, does not, in terms, assume to make the lot-owners liable to the party injured, and we do not think there is anything in its spirit or meaning which creates such a liability.

It is argued that the liability is created by force of the rule that "where the statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." This rule undoubtedly embodies a sound proposition of law, and has been frequently approved and enforced in our courts: *Willy v. Mulledy*, 78 N. Y. 310; 34 Am. Rep. 536. But it is not broad enough to cover the present cause of action. There is nothing in this statute showing that the duty of repairs was imposed upon the lot-owners for the benefit of the public generally, or any particular class of individuals. On the 'con-

trary, it is quite obvious that neither the public nor individuals at all needed its benefits. They were already sufficiently secured in the right to have passable and safe highways, by the obligations of the charter requiring them to be furnished by the municipality, and abundant indemnity was provided for any damages that might be sustained from defective streets through the common-law liability of the corporation therefor. The statute, therefore, had some other object and purpose, and that can be found in the necessity of furnishing to the municipality, by a proper distribution of burdens, the means of discharging its duty to keep the streets in repair, and that alone.

We think the lot-owners are liable to the municipality upon a neglect to repair the streets after notice, for the expense which the corporation has incurred in making such repair; but this, we think, is the extent of their liability under the statute. It is a familiar rule in the construction of statutes that where a new right is created, or a new duty imposed by statute, if a remedy be given by the same statute for its violation or non-performance, the remedy given is exclusive, and we think this statute is clearly within the meaning and spirit of this rule. The statute clearly points out the liability which is incurred by the lot-owners for a neglect to make repairs, and gives the street superintendent an action to recover the damages suffered by the municipality from such cause. This evidently affords a full indemnity to the city for any neglect of the lot-owners, and ample means to discharge its duty to make repairs. It seems entirely unreasonable to suppose that the act was intended to impose the same duty upon two independent bodies.

The obligation of the municipality to make such repairs is unconditional and unquestioned. It is not only charged with the duty of keeping the streets in repair and regulating the uses and purposes to which they may be devoted, but it has the power to permit temporary obstructions and erections to be made in them, and to make excavations, authorize disruptions, and grant permanent appropriation of rights under the streets to individuals and corporations desiring to occupy them for public purposes.

It cannot be supposed that the legislature intended to impose an absolute duty to repair upon an individual who could not exercise it except under the control of another. That the primary duty rests upon the municipality, notwithstanding a

duty has also been imposed upon property owners, has been decided in this court: *Russell v. Village of Canastota*, 98 N. Y. 496. And it is inconsistent with this duty and the control which the municipality has of the streets to suppose that it was intended to impose a primary duty also upon the property owners. The two obligations are inconsistent with each other, and can lead only to confusion and delay in the performance of a public service. The existence of an absolute power of control in one party and an imperative obligation to repair in another is impossible. The obligation to repair is necessarily subservient to the other, and must be performed or neglected, at the will and pleasure of the party having the right of control. There is no divided duty here. The obligation to keep the streets and highways in repair rested on the towns. They could always perform this duty through the agency of others, and for the purpose of enabling them to do so they could, in specific cases, impose its performance on the lot-owners, or compel them to pay the expense the town was subjected to in case it performed the duty, but the paramount obligation always rested upon the corporation.

We have thus seen that the immunity of the lot-owner from liability for damages for defects in streets is founded in reason and justice, and is supported, not only by authority, but by the uniform current of authority, not only in this but in our sister states. The cases referred to in the court below to support the doctrine of the right of the municipality to recover in such cases are: *City of Rochester v. Montgomery*, 72 N. Y. 65; *Village of Port Jervis v. First Nat. Bank of Port Jervis*, 96 N. Y. 550; *Robbins v. City of Chicago*, 4 Wall. 657; *City of Lowell v. Short*, 4 Cush. 275. These were all cases where the dangerous conditions of the street were created by the defendants, and they were held liable for the consequences of their unlawful acts under their common-law obligations as the creators of a nuisance, and not by reason of any duty enjoined upon them by statute or otherwise. The distinction between such cases and those relating to the consequences following a neglect of some duty imposed by statute are manifest and radical.

It was substantially held in the case of *Village of Fulton v. Tucker*, 3 Hun, 529, in an opinion written by that learned judge, the late Justice Talcott, that the lot-owner was not liable to the municipality, even where the duty of repairing sidewalks had been imposed by ordinance upon him.

In *Moore v. Gadsden*, 93 N. Y. 12, it was held that the ne-

glect of a lot-owner to remove snow and ice from a sidewalk, as required by an ordinance, did not render such owner liable to a party injured; that the requirement of the ordinance was in the nature of a police regulation, and was not sufficient to give a cause of action to a party injured by an act in violation of its terms. See also *Wenzlick v. McCotter*, 87 N. Y. 127.

It will be observed that the duty of repair, in this case, is imposed in the same language with that to remove snow and ice, and it is not easy to suggest any distinction in the nature of the respective obligations. And it is equally difficult to suggest any difference in principle between an obligation imposed by statute, and one imposed by ordinance in pursuance of statutory authority. The general rule regulating the liabilities of municipalities and lot-owners, in respect to the repair of streets and sidewalks, is laid down by Dillon as follows: "The liability of a city or town for actionable defects extends, as already remarked, to sidewalks, they being deemed to constitute part of the street. When the charter of a city gives it the power to cause sidewalks to be kept in repair, and makes adequate provision for so doing, the exercise of the power, according to the prevailing judgment of the courts, follows as a duty. In such case the city is liable for actionable defects in sidewalks, although the charter requires the lot-owner to build the sidewalks, and imposes a penalty for his failure in this regard. The abutting owner is not bound to keep the sidewalk in repair, unless by virtue of the requirement of the statute, and is not responsible to travelers for defects therein not caused by himself": Dillon on Municipal Corporations, sec. 1012. The learned author cites, in support of the propositions, a large number of authorities, among which are: *Moore v. Gadsden*, 93 N. Y. 12; *Hill v. City of Fond du Lac*, 56 Wis. 242; *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Weller v. McCormick*, 47 N. J. L. 397; 54 Am. Rep. 175; *Kirby v. Boylston Market Ass'n*, 14 Gray, 249; 74 Am. Dec. 682; *Flynn v. Canton Co.*, 40 Md. 312; 17 Am. Rep. 603; *Heeney v. Sprague*, 11 R. I. 456; 23 Am. Rep. 502; *City of Hartford v. Talcott*, 48 Conn. 525; 40 Am. Rep. 189; *Eustace v. Jahns*, 38 Cal. 3; *Jansen v. City of Atchison*, 16 Kan. 358; *State v. Gorham*, 37 Me. 451. The cases cited seem to support the proposition of the non-liability of the lot-owner to travelers or municipalities.

In *Kirby v. Boylston Market Ass'n*, 14 Gray, 252, 74 Am. Dec. 682, it is said: "The defendants, as owners and occu-

pants of the land abutting upon Boylston Street, are not responsible to individuals for injuries resulting to them from defects and want of repair in the sidewalk, or by means of snow and ice accumulated by natural causes thereon, although, by ordinance of the city, it is made the duty of abutters, under prescribed penalties, to keep the sidewalks adjoining their estates in good repair, and seasonably to remove all snow and ice therefrom. Such ordinances are valid, and the work which is enforced under them relieves, to the extent of its cost or value, the city from charges which otherwise it would be necessarily, in discharge of its municipal duties, subjected to. *Goddard, Petitioner*, 16 Pick. 504; 28 Am. Dec. 259. For the city is required to keep all duly established highways within its limits in good repair, and clear of snow and ice, so that they shall, at all seasons of the year, be safe and convenient for persons passing and traveling thereon." In *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502, it was held that "the violation of a duty imposed by a municipal ordinance, and sanctioned by a fine, will not support an action on the case for special damages in favor of one injured by the violation and against the violator"; and that "where a statute imposes a duty, unless the duty is for the benefit of particular persons or classes, or is in consideration of some emolument or privilege conferred, a person damnified by the violation of the duty cannot maintain an action on the case against the violator for special injuries caused by the violation; the only liability arising from the violation of such a duty being the penalty furnished by the statute." In *City of Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189, the city brought an action to recover from the lot-owner the damages which it had been compelled to pay a traveler for injuries received from a sidewalk made dangerous by ice. The ordinances required the abutting owners to keep the sidewalk free from snow and ice, and imposed a penalty for a neglect to do so. It was held that the abutting owners were not liable to the city. In *Keokuk v. District of Keokuk*, 53 Iowa, 352, 36 Am. Rep. 226, it was held that "where a lot-owner is required by the city to construct or repair a sidewalk, it is simply a method of exercising its power of taxation, by which he is made the agent of the city to expend the amount of the tax, and the responsibility for the performance of the work remains where the authority to control it is found."

In the Flynn case, the injured party brought an action

against the abutting owner, whose duty it was, by the ordinance of the city, to remove snow and ice from the sidewalk in front of his premises, to recover damages for his injuries. In deciding the case, the court say: "The whole design and effect of this ordinance was to secure the proper application of whatever labor and means were necessary to discharge the obligation then resting upon the city to keep its streets in a condition to be safely traveled. The work enforced under it, and the expense of doing it, when performed by the employees of the city, together with the fines or penalties for neglect, which may be imposed and collected, relieves the city to that extent from charges to which it would be otherwise subjected. Stated in a different form, our view of the effect of this ordinance is this: At the time of its passage it was the duty of the city to remove snow and ice from the sidewalks of its streets, so as to render them safely passable. The city was then provided with the means and power to discharge that duty. In the exercise of that power it saw fit to provide, by ordinance, that the owners and occupants of premises abutting the sidewalks should either remove the snow and ice therefrom, or be charged with the cost of such removal, if done by its own officers or employees, besides being subjected to a penalty for each neglect. The property owners were thereby made the agents of the city. . . . Such being the nature of the duty required, and such being the character of the ordinance in question, we are of opinion the only liability resting upon the property owner is that which the ordinance itself imposes, viz., the prescribed fine or penalty for each neglect, and the cost of removal in every instance of his refusal or neglect. By enforcing these, every object the ordinance was intended to accomplish will be attained. The liability of the parties upon whom it operates extends no further, and against them an action like this cannot be maintained. In so determining, we recognize the well-settled principle that whenever a party causes, constructs, or creates a nuisance or obstruction in a public street or highway, he is responsible in damages to any one who has received special injury in consequence thereof."

In *Taylor v. Lake Shore & M. S. R. R. Co.*, 45 Mich. 74, 40 Am. Rep. 457, the head-note states that "an ordinance requiring all persons to keep their sidewalks free from ice imposes a purely public duty, and persons injured by slipping on the ice cannot bring private actions against the owners of the premises. Breaches of public duty must be punished in some

form of public prosecution, and not by way of individual recovery of damages."

We have thus referred at length to many of the cases holding the non-liability of the lot-owners, for the reason that there seems to have been quite a common impression, in which judges and lawyers have shared, that abutting owners are in some way liable to an injured party for damages occasioned from their neglect to keep sidewalks in repair when that duty is in any way enjoined upon them. It seems to us that there could never have been any logical cause for such impression, and it seems it has no foundation in the reported cases. Any other conclusion than that reached by us would, we think, be most unfortunate, as it would tend to relax the vigilance of municipal corporations in the performance of their duties in respect to the repair of streets and highways, and impose that duty upon those who might be utterly unable to discharge it. It would tend directly to demoralize the public service, and lead to disorder, decay, and impassability of the public highways.

In view of the conclusions reached upon the main question involved, it is unnecessary to discuss the other points raised in the appeal.

The judgment of the general term should, therefore, be reversed, and that of the special term affirmed, with costs in all courts.

MUNICIPAL CORPORATIONS — LIABILITY OF LOT-OWNER FOR NON-REPAIR OF STREETS. — No common-law duty rests upon the owner or occupant of premises fronting upon a public street or highway to keep such street or highway in repair. And as to what is the liability of a property owner for neglect to repair streets adjacent to the property, when this duty is sought to be imposed upon him by law or ordinance, see note to *Browning v. City of Springfield*, 63 Am. Dec. 355-357. Compare *Inhabitants of Lowell v. Boston etc. R. R. Corp.*, 23 Pick. 24; 34 Am. Dec. 33, and note 40, 41.

VILAS v. PLATTSBURGH AND MONTREAL R. R. Co.

[128 NEW YORK, 440.]

RELIEF AGAINST JUDGMENT RENDERED UPON UNAUTHORIZED APPEARANCE OF ATTORNEY, HOW TO BE SOUGHT. — In the absence of special circumstances necessitating a resort to a court of equity, relief from a judgment rendered against a party, upon the unauthorized appearance of an attorney in his name, is to be sought in a direct application to the court by motion in the action in which the unauthorized appearance was entered. Where, therefore, it appears without dispute from the moving papers that the moving party was neither served with process in the action, nor authorized the attorney who entered an appearance in his name to appear for him, nor had any notice of the action until after the rendition of the judgment, it is error to deny the motion and remit the moving party to his remedy by action.

JUDGMENT RENDERED UPON UNAUTHORIZED APPEARANCE OF ATTORNEY VACATED ABSOLUTELY WHEN. — A judgment rendered upon an unauthorized appearance of an attorney will be absolutely vacated and set aside, where the attorney is insolvent at the time the application for relief is made, although he may not have been insolvent when the judgment was rendered, provided the application is made before the rights of the party procuring the judgment have changed to his prejudice. And where the judgment against which relief is sought was rendered against the moving party and other co-defendants, and the latter appealed therefrom and had it reversed, this judgment of reversal, though not an estoppel of record, because he was not a party to the appeal, nevertheless furnishes a strong reason for vacating the judgment absolutely, and for granting him final relief upon the motion.

DOCTRINE OF DENTON v. NOYES NOT APPLICABLE WHERE DEFENDANT IN JUDGMENT WAS NON-RESIDENT AND WITHOUT JURISDICTION. — The rule that, in the case of a strictly domestic judgment, a party not served, but for whom an unauthorized appearance was entered by an attorney, cannot, on those grounds, assail the judgment for want of jurisdiction, is inapplicable in a case where the defendant in the judgment was a non-resident of the state during the pendency of the proceedings and was not within the jurisdiction.

LACHES, DEFENDANT IN JUDGMENT UPON UNAUTHORIZED APPEARANCE OF ATTORNEY NOT GUILTY OF, WHEN. — The judgment against which relief was sought was entered in 1880. The plaintiff soon after learned that the defendant, the moving party, had not been served, and that the attorney's appearance was unauthorized, and in 1881 he brought an action in Massachusetts, where the defendant resided, on the judgment, to which the defendant answered that the court which rendered the judgment never had jurisdiction. About two years after, a nonsuit was granted in the Massachusetts action, on the plaintiff's application. In 1887, the judgment was reversed as to other co-defendants, who had appealed, and thereafter the plaintiff assigned to a party that had full notice of defendant's equities. The motion to vacate was made in 1888, and it did not appear that the delay in making it had changed the situation of either the plaintiff or his assignee. A denial of the motion, on the ground of laches, was held to be erroneous, and that the plea of laches ought not

to be listened to to uphold a judgment which on the appeal of the co-defendants, standing in the same position, had been held to have no legal foundation.

MOTION to vacate a judgment. One of the motions was made by George B. Chase, and the other by the executrix of John N. Whiting. The facts necessary to an understanding of the questions decided appear from the opinion.

Peter B. Olney, for the appellant.

Edwin Young, for the respondents.

ANDREWS, J. We understand that it has become the settled practice in this state that relief against a judgment rendered against a party upon the unauthorized appearance of an attorney in his name is to be sought in a direct application to the court by motion in the action in which the unauthorized appearance was entered. This was the remedy adopted in the leading case of *Denton v. Noyes*, 6 Johns. 297, 5 Am. Dec. 237, and in every subsequent case of a like character in this state which has come to our notice: *Grazebrook v. McCreddie*, 9 Wend. 437; *Adams v. Gilbert*, 9 Wend. 499; *Campbell v. Bristol*, 19 Wend. 101; *American Ins. Co. v. Oakley*, 9 Paige, 496; 38 Am. Dec. 561; *Hamilton v. Wright*, 37 N. Y. 502. In *Brown v. Nichols*, 42 N. Y. 31, which was the case of a creditor's bill founded on a judgment rendered against the defendant's intestate, the defendant sought to impeach the judgment by proof that the defendant was not served with process, and that an appearance entered for him in the action by an attorney was unauthorized. The court overruled the defense, holding that the authority of the attorney to appear could not be questioned collaterally, but pointed out the remedy, Earl, J., saying, "I think a party should always seek relief for an unauthorized appearance in the suit in which it has been put in, where the rights and equities of all parties can be best protected." In *Ferguson v. Crawford*, 70 N. Y. 256, 26 Am. Rep. 589, Rapallo, J., referring to the rule established in *Denton v. Noyes*, 6 Johns. 297, 5 Am. Dec. 237, and to the cases following it, said: "For reasons of public policy, the court holds the appearance good, leaving the aggrieved party to his action for damages against the attorney, granting relief against the judgment only in a direct application." See also *Sperry v. Reynolds*, 65 N. Y. 183.

The jurisdiction of a court of equity to set aside a judg-

ment at law obtained by fraud, or on other grounds of equitable cognizance, has been often asserted and is unquestioned, and it is not necessary now to deny that, under special circumstances, where the question of the unauthorized appearance is complicated with fraud, or the rights of purchasers or the circumstances are such that the court can see that the right to or measure of relief cannot properly be determined on motion having regard to all interests affected, resort may be had to a bill in equity, or now, in this state, to an equitable action. There are several cases in other courts where jurisdiction in equity by original bill to set aside a judgment entered on an unauthorized appearance by attorney has been entertained. But all of them are marked by peculiar and special features, such as those to which we have adverted: *Shelton v. Tiffin*, 6 How. 163; *Harshey v. Blackmarr*, 20 Iowa, 161; 89 Am. Dec. 520; *Wiley v. Pratt*, 23 Ind. 628.

In *Critchfield v. Porter*, 3 Ohio, 518, the supreme court of Ohio dismissed a bill filed for relief against a judgment rendered on an appearance of an attorney without authority, on the express ground that the remedy should be sought by application to the court in which the judgment was rendered. It seems to us that upon considerations, both of principle and policy, relief, except in special cases, should be sought on motion in the action. It is the established rule, where courts of law and equity are separated, that equity will not grant its aid where there is a plain and adequate remedy at law. Under our system of procedure, relief on motion is administered upon equitable as well as legal principles. In ordinary cases, where relief is sought against a judgment on the ground that the appearance of an attorney was unauthorized, the rights of the parties can be as fully presented and as carefully adjudged on a motion as in an action. If the facts are controverted, and the court is not satisfied upon the affidavits and papers presented as to what the real facts are, it may refer the matter for the purpose of taking further evidence, and may require the parties to submit to an oral examination or cross-examination: Code Civ. Proc., sec. 1015. The court, on a motion, possesses, indeed, all the substantial powers in conducting an investigation which formerly appertained to the chancellor. The remedy by motion is more convenient, prompt, and less expensive than by action. The unbroken practice, which seems to have prevailed in this state, to seek relief in cases like this by motion, and not by action, has

almost the force of law, and ought, we think, to be followed unless special circumstances exist which may render that remedy inadequate or incomplete. No such special circumstances existed in the present case, and we are therefore of opinion, notwithstanding the observations of Grover, J., in his dissenting opinion in *Brown v. Nichols*, 42 N. Y. 31, that the order below cannot be sustained on the ground that it was discretionary with the court to remit the appellant to a remedy by action.

In disposing of this appeal it must, we think, be assumed, upon the papers presented on the motions, that the appellant, Chase, was neither served with process in the action nor authorized Mr. Whiting to appear for him, and also that he had no knowledge that such an action had been brought nor any notice thereof until February, 1881, after the rendition of the judgment of the special term. These facts are specially and particularly alleged in the moving papers, and are in no respect controverted by the opposing affidavits. The other circumstances are also consistent with the claim made. Chase was a non-resident of the state during the whole period of the litigation. That he was never served with the process is conceded. Mr. Whiting, on the occasion of the interview with Mr. Dabney, the attorney employed by Mr. Chase, after he had been notified of the judgment rendered against him, admitted that he was not retained by Mr. Chase personally, and that he appeared for him by direction of Mr. Page, one of the co-defendants. Mr. Chase did not know Mr. Whiting, and never saw him prior to the rendition of the judgment. He swears that he had no knowledge that Vilas made any claim against him. He knew that Vilas claimed title to rolling stock of the Plattsburgh and Montreal Railroad Company, which, if established in the foreclosure action, would, under the agreement between him and the receiver, be converted into a lien on the property. In the present action Vilas claimed that Page, Butler, and Chase were jointly liable to him for the lien debt; but this claim was adjudicated adversely to him by the judgment of this court: *Vilas v. Page*, 106 N. Y. 440. There is no suggestion that Vilas ever asserted any personal claim against Chase, except by and through the complaint in this action. The relations between Chase and Page at the time of the alleged retainer by the latter of Whiting to appear for Chase were hostile and so continued. But Page had an interest, in case the claim of Vilas for a personal judgment against the

individual defendants should be established, that Chase should be bound by the judgment. The Delaware and Hudson Canal Company (the real party opposing these motions) not only omitted to controvert any of the statements in the moving papers on the subject of the unauthorized appearance, but made no request for a reference to ascertain the facts, nor that it might be afforded an opportunity to cross-examine Chase or the other affiants on the subject.

The main question of law respects the relief, if any, to which Chase is entitled against the judgment by reason of the unauthorized appearance of Mr. Whiting. It is obvious that the court acquired no jurisdiction to render a personal judgment against Chase, unless the appearance, although unauthorized, conferred jurisdiction, or unless the authority of the attorney to appear is conclusively presumed from the fact of appearance. The case of *Denton v. Noyes*, 6 Johns. 297, 5 Am. Dec. 237, held that a domestic judgment rendered by a court of general jurisdiction against a party who had not been served with process, but for whom an attorney of the court had appeared, though without authority, was neither void nor irregular. The doctrine of the prevailing opinion in that case encountered a vigorous opposition from one of the judges at the time, and it is not too much to say that the reasoning upon which it rests has frequently been criticised by judges, and the justice of the rule denied. But it has been followed, and must be regarded as the law of the state: *Hamilton v. Wright*, 37 N. Y. 502; *Brown v. Nichols*, 42 N. Y. 26.

The courts in this state, while holding that domestic judgments rendered against a party not served, but for whom an attorney appeared without authority, cannot be assailed on this ground when coming in question collaterally, nevertheless grant relief, on motion, either by setting aside the judgment absolutely, or by staying proceedings, and permitting the party to come in and defend the action. Where the attorney is insolvent, the judgment will be absolutely vacated and set aside: *Campbell v. Bristol*, 19 Wend. 101. In other cases, the proceedings will be stayed, and the party permitted to come in and defend. The latter relief was granted in *Denton v. Noyes*, 6 Johns. 297; 5 Am. Dec. 237. In the present case, no relief whatever was granted, but the application therefor was denied absolutely. Even if the judgment against Chase is governed by the rule established in *Denton v. Noyes*, 6 Johns. 297, 5 Am. Dec. 237 (which, for reasons which will be stated, does

not, we think, apply), then it would seem that the court erred in denying relief. It is shown by the affidavit of the son of Mr. Whiting, which is uncontradicted, that his father's estate, at the time of his death, in 1885, was entirely inadequate to pay the amount of the judgment against Chase. It is not expressly shown what the pecuniary condition of Mr. Whiting was in 1881, when the judgment against Chase was entered; but assuming that Mr. Whiting had sufficient pecuniary ability at that time to respond in damages for the amount of the judgment, that, we think, is not controlling to prevent relief on an application made after he became insolvent, provided it was made before the rights of the party procuring the judgment had changed to his prejudice. The party against whom the judgment was rendered would still be entitled, we think, to apply for and obtain relief by the vacation of the judgment. The plaintiff has no equity which entitles him to claim that the party injured should have been prompt to pursue and obtain a remedy by action against the attorney for damages, and thereby enable the plaintiff to have the benefit of the judgment. Moreover, the judgment of the court in 106 New York, in the present action, conclusively determined, as between the plaintiff and the defendants Page and Butler, that the latter had never assumed any personal obligation for the lien debt. If this judgment was not technically an estoppel of record as to the same question arising between the plaintiffs and Chase, on the ground that he was not a party to the appeal, nevertheless it furnishes a strong reason for granting him absolute and final relief on this application, even if the estate of Mr. Whiting was solvent, instead of granting limited relief by a stay of proceedings merely, with a right to come in and defend the action, thereby subjecting Chase to the trouble and expense of a new trial, which could have but one result.

We have so far considered the case upon the assumption that it is governed by *Denton v. Noyes*, 6 Johns. 297, 5 Am. Dec. 237, and the cases following it. But we are of opinion that a radical distinction exists between the cases hitherto decided and the present one, which prevents the application of the principle that, in the case of a domestic judgment strictly, a party not served, but for whom an unauthorized appearance was entered by an attorney, cannot, on these grounds, assail the judgment for want of jurisdiction. The distinction adverted to lies in the fact that in the cases hitherto decided in this state arising on domestic judgments the judgment

rendered was against a citizen of the state who was within the jurisdiction, while in the present case the defendant in the judgment was at all time a non-resident and out of the jurisdiction. It is well settled that in an action brought in our courts on a judgment of a court of a sister state the jurisdiction of the court to render the judgment may be assailed by proof that the defendant was not served and did not appear in the action, or where an appearance was entered by an attorney, that the appearance was unauthorized, and this even where the proof directly contradicts the record: *Starbuck v. Murray*, 5 Wend. 148; 21 Am. Dec. 172; *Shumway v. Stillman*, 6 Wend. 447; *Kerr v. Kerr*, 41 N. Y. 278; *Rapallo, J., in Ferguson v. Crawford*, 70 N. Y. 257; 26 Am. Rep. 589. The same rule is held elsewhere, and is not inconsistent with the constitutional obligation under the constitution of the United States, that full faith and credit shall be given in each state to the judgments of other states: *Gilman v. Gilman*, 126 Mass. 26; 30 Am. Rep. 646; *Wright v. Andrews*, 130 Mass. 149; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas Light & C. Co.*, 19 Wall. 58. There is undoubtedly a logical difficulty in applying a different rule, as our courts do, in an action upon a domestic judgment, where the only thing giving color of jurisdiction over the person is an unauthorized appearance by an attorney. The different rule in the two cases has been supposed to rest on the unreasonableness of compelling a party against whom judgment has been rendered in another state on an unauthorized appearance by an attorney to go to the foreign jurisdiction to attack it: See *Dillon, J., in Harshey v. Blackmarr*, 20 Iowa, 161; 89 Am. Dec. 520. The same reason, in justice, would seem to apply in case of domestic judgment against a non-resident of the state, and besides, it may be said that a non-resident not served with process, and for whom an unauthorized appearance has been entered in the foreign jurisdiction, would be much less likely to become apprised of the pendency of the action than if he had been a resident. In *Nordlinger v. De Mier*, 54 Hun, 276, the general term of the supreme court in the first department, Barrett, J., writing the opinion, set aside an unauthorized appearance entered for a non-resident defendant on the precise ground that the rule in *Denton v. Noyes*, 6 Johns. 297, 5 Am. Dec. 237, did not apply in such a case. *Bodurtha v. Goodrich*, 3 Gray, 508, was the case of an unauthorized appearance by an attorney for Bodurtha, a non-resident of Massachusetts, in an action brought in the latter

state. The court reversed the judgment on writ of error, Shaw, C. J., saying: "It would certainly be very strange if an inhabitant of another state could thus be bound by a judgment given and recorded by a court having no jurisdiction, without any act or default of such party." In *Wiley v. Pratt*, 23 Ind. 629, the court, in a case of a domestic judgment, where the party had not been served, but for whom an unauthorized appearance had been entered, adopted, substantially, the English rule, as announced in *Bayley v. Buckland*, 1 Ex. 1, that where a defendant had been served and an unauthorized appearance entered, the judgment would not be set aside, but if he had not been served, it would be. Ray, C. J., after stating what he conceived to be the true rule; but excepting from it the case of a domestic judgment against a non-resident not within the jurisdiction, said: "Where the defendant has not been within the jurisdiction of the court, it would not be just to compel him to come under that jurisdiction and establish his defense to the action in order to claim relief from a judgment obtained without notice, and therefore the relief granted here must be absolute immunity from the judgment."

We are bound, under our decisions, to follow the doctrine of *Denton v. Noyes*, 6 Johns. 297, 5 Am. Dec. 237, in cases where it is strictly applicable. It is, as to such cases, *stare decisis*. But we are not disposed to extend the doctrine of that case to cases fairly and reasonably distinguishable, and the fact that a defendant against whom a judgment has been obtained here upon an unauthorized appearance by an attorney, and who was not served, was a non-resident during the pendency of the proceedings, and was not within the jurisdiction, does, we think, constitute such a distinction as renders the rule in that case inapplicable.

Upon the point made by the Delaware and Hudson Canal Company, that the defendant Chase is precluded from relief by his laches, but little need be said. The Delaware and Hudson Canal Company acquired its interest in the property of the Plattsburgh and Montreal Railroad Company in 1872. It took from Page his individual guaranty against the claims of third persons on the property, including the claim of Vilas. Neither Butler nor Chase were parties to the guaranty. In 1881, soon after the judgment against Chase was rendered, it was apprised of his claim that he had not been served in the action, and that the appearance of Whiting was unauthorized. When Vilas sued Chase on the judgment in Massachusetts,

the latter promptly disavowed the jurisdiction of the court to render the judgment. Vilas, after the lapse of about two years, suffered a nonsuit, inferably because he was unable to establish the jurisdiction, and he took no further proceedings to collect the judgment; but after the final decision in this court, he assigned the judgment against Chase to the Delaware and Hudson Canal Company, on being paid the amount of the lien adjudged in the action against the property in the possession of that company. The company took the assignment with full notice of the equities of Chase. The delay of Chase has not, so far as appears, changed the situation of either Vilas or the Delaware and Hudson Canal Company to the prejudice of either, and under such circumstances the plea of laches, as was said in *Platt v. Platt*, 58 N. Y. 646, will not be readily listened to, and ought not, we think, to be listened to in this case to uphold a judgment which, as was held by this court on the appeal of the co-defendants of Chase, standing in the same position with him, had no legal foundation.

We think the motions in this case should have been granted, and the judgment and appearance vacated.

The orders of the special and general terms should therefore be reversed, and the motions granted, with costs.

JUDGMENTS RENDERED UPON UNAUTHORIZED APPEARANCE OF ATTORNEY.—An appearance by an unauthorized attorney binds no one; and the presumption that an attorney who appeared was authorized to do so may be rebutted, in any direct proceeding to attack the judgment based upon such appearance, by showing no process was served in the action, and that the attorney appeared without the consent or knowledge of the one whom he assumed to represent: *Great West Min. Co. v. Woodmas*, 12 Col. 46; 13 Am. St. Rep. 204, and note; *Winters v. Means*, 25 Neb. 241; 13 Am. St. Rep. 489. See, more particularly, extended note to *Bunton v. Lyford*, 75 Am. Dec. 146-151, upon the validity of judgments rendered upon the appearance of an attorney.

THIRD NATIONAL BANK OF BUFFALO v. GUENTHER.

[123 NEW YORK, 568.]

MARRIED WOMAN MAY EMPLOY HER HUSBAND AS AGENT, AND AGREE TO COMPENSATE HIM, WHEN. — A married woman who is possessed of a separate estate, and is engaged in conducting a separate business, may employ her husband as her agent to carry on such business, and has the right to compensate him for his services.

WIFE MAY, IN ASSIGNMENT, PROVIDE FOR COMPENSATION SHE AGREED TO PAY HER HUSBAND. — Compensation which a married woman has agreed to pay to her husband for services rendered by him in carrying on her separate business is a moral obligation which she can voluntarily pay or provide for in an assignment for the benefit of her creditors, without furnishing any legal or just ground for complaint on the part of her other creditors, provided the transaction is free from actual fraud.

AGREEMENT TO SUPPORT FAMILY, RIGHT OF MARRIED WOMAN TO PERFORM. — An agreement by a married woman, with her husband, to support the family, although not enforceable against her so long as it remains executory, may be rightfully performed by her; and if she was perfectly solvent when she entered into it, without any fraudulent intent, and she has performed it, she cannot undo what has been done by recalling what she has paid, or require the husband to reimburse her for the outlay.

ACTION to set aside an assignment for the benefit of creditors. The opinion states the case.

J. S. Romer, for the appellants.

Adelbert Moot, for the respondent.

O'BRIEN, J. This action was brought by the plaintiff, a judgment creditor of the defendant Georgianna J. Guenther, to annul and set aside as fraudulent and void a general assignment for the benefit of creditors, with preferences made by said Georgianna to the defendant John L. Romer, on the eighth day of May, 1883, and also a mortgage for the sum of \$5,545.58, covering real estate, made by her on the same day to her husband, John G. Guenther, and John Dunbar, as executors of the last will of her father, Henry T. Gillett, who died in the year 1874. The referee to whom the case was referred sustained the mortgage, but held that the assignment was void because the assignor had included in it and directed the payment, as a preferred claim, of the sum of seven thousand dollars to the husband of the assignor, which claim the referee held was without any consideration. It appears that after the assignment was made the plaintiff and other creditors of the assignor began actions to procure judgments against her upon claims held by them on which attachments were issued

to the sheriff, and levy made upon certain personal property embraced in the assignment and in possession of the assignee, which was subsequently sold by virtue of the levy. The assignee brought an action in the supreme court against the sheriff for a conversion of this property. The sheriff set up the same facts in his defense, touching the validity of the assignment, as are relied upon to invalidate it in this action. Both actions were referred to the same referee, and they were tried together under a stipulation that the testimony, rulings, and objections should apply to both cases. This action to set aside the assignment was brought in the superior court of Buffalo. The referee held in both cases that the assignment was void on account of the preference to John G. Guenther, the husband. The general term of the supreme court in the suit by the assignee against the sheriff reversed the judgment on the ground that the preference to the husband was supported by a sufficient consideration, and his claim might lawfully be provided for by the wife in making an assignment for the benefit of creditors: *Romer v. Koch*, 49 Hun, 483.

The general term of the superior court sustained the judgment in this case entered upon the referee's report, holding that the assignment was invalid. In order to get a clearer view of the question, in regard to which two very learned and able courts entertain opposite and conflicting opinions, a clear understanding of the facts which underlie it is necessary, and they are practically undisputed. The assignor is the daughter of Henry T. Gillett, who died November 23, 1874, leaving a will in which his daughter, this defendant, then married, was named as the residuary legatee and devisee. It is found by the referee that Gillett, at the time of his death, was possessed of a large estate, and was then and for some years prior to that date engaged in partnership with his son-in-law, John G. Guenther, in carrying on the wholesale and retail rectifying and liquor business in the city of Buffalo, under the firm name of Henry T. Gillett and Son; that Henry T. Gillett owned all the property and assets of the firm, his son-in-law being interested only in the profits, and being, under the arrangement, entitled to receive one half of the same. After the death of Henry T. Gillett, the son-in-law, said John G. Guenther, as survivor, carried on the business in the same firm name until May 1, 1876, when, as such survivor, and also as executor of the will of his father-in-law, he assigned and transferred to his wife, the residuary legatee, by written

instrument, "all and singular the goods, chattels, property, and effects of whatsoever name, kind, or character, or where-soever situate, of said firm of Henry T. Gillett and Son." The wife assumed all the debts of the firm, and released her husband from all claims on account of past transactions, and having thus become possessed of the firm property and a considerable estate left by her father, she employed her husband, who had no property of his own, to take charge of and carry on the wholesale and retail rectifying and liquor business for her under the old firm name of Henry T. Gillett and Son. And she also further agreed with her husband that she would assume and pay all the expenses of supporting the family. She also, on the first day of May, 1876, executed, acknowledged, and procured to be recorded in the office of the clerk of the county a certificate, pursuant to the statute permitting the continued use of partnership names, stating that she was the person "now and hereafter" dealing under the firm name of Henry T. Gillett and Son; that her residence or place of abode was in Buffalo, and that her husband, John G. Guenther, was her agent for carrying on said business. The business was conducted by the husband under this power and in this manner until May 9, 1883, the day after the date of the assignment, which is the subject of this controversy. During all this time the management and conduct of the business was wholly intrusted to the husband. The wife was without business experience, and had no knowledge of the details of the business, or the methods by which it was carried on, or whether profitable or not. She agreed to pay her husband sixteen hundred dollars per year for his services, and the referee finds that this was a reasonable compensation. It is also found that during the time the husband had charge of the business, the expenses of supporting the family, consisting of the husband, wife, and one child, in a proper and reasonable manner, not including the expense of maintaining the dwelling-house and repairing and insuring the same, amounted to between two thousand and two thousand five hundred dollars per year, which was paid by the husband out of the proceeds of the business. The amount drawn by the husband during this time from the business to pay the family expenses amounted to upwards of \$10,000, and to apply upon his salary, \$2,031.38. When the assignment in question was made, the assignor was indebted to divers parties in the sum of seventy thousand dollars and upwards, which she was unable to pay.

The assignee, acting in good faith, and, as is found, without any fraudulent intent, took possession of the property embraced in the assignment, having duly qualified, and he claims the property as such assignee for the purposes of the trust. Numerous other facts were found relating to the origin, history, and validity of the mortgage, which the referee held to be valid, and as all parties seem to have acquiesced in that part of the decision, we are not concerned with it on this appeal.

The referee held that the promise and agreement of the wife to support the family was void, and that as the husband had drawn from the business in all over twelve thousand dollars, there was nothing due to him for salary from the wife, and "that by reason of such preference and the directions to said assignee, so contained in said assignment, to pay to said John G. Guenther out of said assigned property and estate said sum of seven thousand dollars, said assignment is void." It thus appears that the conclusion that the assignment was void, and the preferred claim of the husband without consideration, was reached by the referee by applying the ten thousand dollars and upwards which the husband drew from the business to pay the family expenses, under a void agreement, upon his salary, thus extinguishing any claim against the wife for the same. We think that the judgment proceeds upon an erroneous view of the transaction. The assignor, upon the death of her father, became possessed of a separate estate, and entered upon the conduct of a separate business which she could manage or carry on either personally or through such agencies as she might select, and for that purpose it was competent for her to appoint her husband: *Abbey v. Deyo*, 44 N. Y. 343; *Buckley v. Wells*, 33 N. Y. 518; *Knapp v. Smith*, 27 N. Y. 278; *Merchant v. Bunnell*, 3 Keyes, 539; *Foster v. Persch*, 68 N. Y. 400; *Kingman v. Frank*, 33 Hun, 471.

The right to employ an agent implies the right to compensate him for his services, and even if it be assumed that the husband would be unable to maintain an action against the wife to recover the agreed compensation, it would still remain a moral obligation which the wife could voluntarily pay or provide for without furnishing any legal or just ground for complaint on the part of her other creditors, providing the transaction was free from actual fraud. So, too, her agreement to support the family in this case was, no doubt, illegal, and perhaps void, in the sense that so long as it remained

executory it could not be enforced against her, but as she entered into the agreement when she was perfectly solvent, and without any fraudulent intent, she had the right to perform it, and having done so, could not undo what had been done by recalling what she had paid or requiring the husband to reimburse her for the outlay. This was the situation in which the assignor was placed before making the assignment. She had performed her agreement to support the family by permitting the husband to pay these expenses out of her funds, but she had not paid the yearly salary which she had stipulated to pay, and it was not a fraud upon her other creditors to provide for its payment in the assignment. We do not consider it necessary to state at greater length the reasons or refer more particularly to the authorities that uphold this proposition. That has been done by the supreme court in *Romer v. Koch*, 49 Hun, 483, in a learned and able opinion which commands our approval. There is nothing in this view of the case that conflicts with *Coleman v. Burr*, 93 N. Y. 17; 45 Am. Rep. 160. In that case the husband agreed to pay his wife a specified sum per week for taking care of his aged mother, whom he was bound to support, and this agreement, honestly made, was the sole consideration for the transfer by the husband to his wife of certain real estate. It was held that this conveyance was void as against the existing creditors of the husband. This result was reached by the application of the common-law doctrine that the marital duty of the wife required her to perform such duties when necessary in the household of her husband, and a contract on the part of the husband to pay her for the performance of such duty was without consideration. That principle has no application here, as it has not yet been held and is not claimed that a husband owes any legal duty to his wife to render services for her, in her separate business, without compensation.

The judgment should be reversed, and a new trial granted, costs to abide the event.

HUSBAND AND WIFE — HUSBAND AS AGENT OF WIFE. — A married woman may appoint her husband as her agent with respect to her separate estate: *Wilkinson v. Elliott*, 43 Kan. 590; 19 Am. St. Rep. 158, and note; *Ross v. Baldwin*, 65 Miss. 570; and even give him a power of attorney to convey her lands: *Benschoter v. Lalk*, 24 Neb. 251. But in Texas it has been decided that a wife cannot empower her husband by a power of attorney to convey by deed her separate property: *Cardwell v. Rogers*, 76 Tex. 37.

Where a wife has appointed her husband as her agent to attend to her business, which is buying and selling horses, the fact that he treats such

horses as his own with her knowledge will not estop her from asserting her title thereto as against his creditors: *Green v. Walker*, 73 Wis. 548. But in *Liddell v. Miller*, 86 Ala. 343, where the husband was engaged in a partnership business with another man, using their joint names as equal partners, it was decided that the wife could not successfully assert against the creditors of her husband that she had an interest in the partnership goods, notwithstanding the fact that the word "agent" was written after the husband's name in his contract of purchase, and he professed to act as his wife's agent.

The wife is, however, under no obligation to compensate her husband for his services as her agent, in the absence of an express agreement to that effect: *Lewis v. Johns*, 24 Cal. 98; 85 Am. Dec. 49.

McKANE v. ADAMS.

[123 NEW YORK, 600.]

VOLUNTARY POLITICAL ASSOCIATION NOT COMPELLABLE BY ACTION TO ADMIT PARTY TO MEMBERSHIP. — Membership in a voluntary political association of individuals, organized without a charter, but regulated as to their action by a constitution and by-laws, is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. And an action cannot be maintained against such an association by a party to compel it to admit him to membership and office therein.

ACTION to compel the defendant to admit the plaintiff to membership. The opinion states the case.

A. H. Dailey, for the appellant.

James Troy, for the respondent.

GRAY, J. By this action, the appellant has sought the aid of the courts to compel a voluntary political association of individuals, organized without a charter, but regulated as to their action by a constitution and by-laws, to admit him to membership and to office with them. The action is against the Democratic General Committee of Kings County, which is the representative and controlling body, or agency, of the Kings County Democratic organization. The plaintiff's complaint is a very voluminous document, containing, as it does, the provisions of the constitutions and by-laws adopted by the Democratic organization for its own government and for that of the various town and ward associations in Kings County, and also a statute of the state passed for the protection of primary elections, etc., most of which contents and references seem quite unnecessary matter to exhibit a cause of action, and useless on any theory, except, possibly, to make up in bulk for the absence of legal grounds for such an action.

It appears that the plaintiff was formerly a member of the Democratic association of the town of Gravesend and a delegate upon the general committee from that town. In December, 1887, the Democratic association of the town of Gravesend, upon charges preferred against it by the Democratic campaign committee, was impeached, tried, and disbanded by the general committee. A reorganization of the town association was undertaken, and a primary election thereupon ordered by the general committee of the county organization, at which the plaintiff was elected a delegate to the general committee. What he complains of is, that being so elected, he was entitled to be admitted as a member of that committee, but that, by a majority vote, it refused to accept the returns of the primary election, referred back the vacancy created, and refused to recognize him as a delegate. By that action on its part, he says he was deprived of his rights and privileges as a member and of the benefits and advantages to flow therefrom. He wants a judgment that he was elected a member of the general committee, an injunction enjoining its members from holding him out from his office as a member, and a judgment for possession of the office and the enjoyment of its rights.

It is difficult to see upon what theory the plaintiff rests his right to any relief of a legal or equitable nature. It is quite unlike the cases in the books, where an individual, having been admitted to membership of a social club or other voluntary association, for purposes of pleasure or profit, and thereby becoming entitled to a right to participate in whatever practical rights or advantages may pertain to membership, seeks redress for some violation of his personal rights. Here, by the disbandment of his town association, plaintiff had ceased to be a member of the general committee. He admits and avers the fact, and makes no complaint of the proceedings. His *status*, therefore, is, that though his town association elected him as a delegate to the general committee of the county organization, the members of that body have refused to admit him to association with them in their office. And if they would and will not associate with him, upon what reasoning or principle should they be compelled to, and the aid of a court of justice invoked? The right to be a member is not conferred by any statute, nor is it derivable, as in the case of an incorporate body. It is by reason of the action and of the assent of members of the voluntary association that one becomes associated with them in the common undertaking, and

not by any outside agency, or by the individual's action. Membership is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. So when, as by the plaintiff's own showing, the committee refused to admit him as a member, or to confirm his election, he was remediless against that refusal. No rights of property or of person were affected, and no rights of citizenship were infringed upon. His allegation of the possession by the committee of a fund, proceeding from dues and contributions, is but a mere pretense to bolster up his case; but a sufficient answer is, that he never became a member of the committee, and hence has never acquired any rights as such, and has no interest in any fund, either individually or in any fiduciary capacity.

We cannot compare this case to that of other voluntary associations, nor to a copartnership to which an unincorporated association is sometimes likened, when considering the rights of the associates in the property of the association and the methods for their enforcement. The Kings County Democratic organization was a voluntary association of persons who were presumably interested, from the very fact of such an organization, in the furtherance of the interests and principles of the Democratic party in that county. Its objects do not involve any combination or acquisition of property, and membership of it, or of its general committee, can have no conceivable pecuniary value. The only tie which binds its members is a common faith in the cause, and the only obligation upon them is to act in harmony, that by unity of action success may attend upon their efforts.

We have in such an association what we must assume to be the voluntary organization of citizens moved only by patriotic considerations in an endeavor to strengthen their party and to promote its interests by organized and systematic work. Our private convictions may possibly and at times be at war with the assumption; but I think we must all concede that organization of human effort for the realization of ideas of political government is as necessary as it is often commendable.

How can it be said that in such work anything like a contract relation subsists, or that there can be any obligation confining the free exercise of the personal rights of citizens? Shall they not be free to reject as an associate, or as an officer of their association, one whose character, aims, or record may, in their judgment, fall below the standard of loyalty or of

integrity demanded by the work in which they are engaged, or who, for any cause satisfactory to their minds, is unfit for the position of leadership he demands to occupy? Surely such propositions would seem to contain their own refutation. The existence of constitutions and by-laws does not alter the question. Obedience to their requirements may well be demanded as a condition of association; but it would be in conflict with the principles of our government and with the spirit and intent of our laws if by any contractual obligation, express or implied, the individual action of the citizen could be fettered in his choice of political associates or leaders, or in the freest exercise of the political rights conferred upon him by the fundamental law. A constitution and by-laws, in such a case, are mere rules for the regulation of the conduct of members in their association, and conducive to the orderly administration of the business which unites them. They can be given no other binding force. Each individual member is free to act according to the dictates of his conscience and judgment, whether the consequence be dissolution of his association or not.

The fundamental error in the contention of the plaintiff and of his counsel consists in their treating the case as though the plaintiff, because elected as a delegate to the general committee, had thereby acquired some property rights, or had become invested with some personal privileges, in the enjoyment of which, by his rejection at the hands of the committee, he had been disturbed.

Such a proposition finds no support upon any principle of law or of ethics, and authority for such an action is utterly wanting. At the most, plaintiff's only apparent cause of complaint is, that the general committee have refused to him participation in their councils. Whether that rejection has been based upon irregularities in his return, or upon his personal untrustworthiness as a party leader, is quite immaterial here, and is a question which, we think, is to be decided by the parties, and not in the courts.

The judgment should be affirmed, with costs.

UNINCORPORATED SOCIETIES, MEMBERSHIP IN. — As to whether courts will interfere with the decision of the persons composing an unincorporated society, with reference to the expulsion, etc., of its members, see note to *Hiss v. Bartlett*, 63 Am. Dec. 776-778.

CASES
IN THE
SUPREME COURT
OF
OREGON.

BUSH v. CITY OF PORTLAND.

[19 OREGON, 45.]

MUNICIPAL CORPORATIONS — RIGHT OF CITY TO CHANGE COURSE OF SURFACE WATER. — A city, while properly improving its streets, has a right to interfere with the natural flow of surface water, and is not liable to an owner of land situated within its limits for not permitting such water, which has been accustomed to flow over the land, to be turned down the gutters of the street, but may carry the water by means of a box-sewer through such land to a natural creek at or near the place where it had formerly flowed.

MUNICIPAL CORPORATIONS — IMPROVEMENT OF STREETS. — A city, while properly improving its streets, is not liable to an owner of land indirectly injured thereby, when such injury is the necessary result of such improvement.

W. H. Adams, for the appellant.

C. M. Idleman, for the respondent.

THAYER, C. J. It appears from the bill of exceptions herein that about the year 1884 the city of Portland caused Fifteenth Street to be improved in front and west of the land described in the complaint, and caused a stream of water, which ran a considerable quantity in winter-time, but was dry during the summer, to run down the open gutter on the west side of said street. Said gutter, however, overflowed as soon as the winter rains came, and washed out a large amount of earth, thereby damaging the street and property below. That thereupon parties supposed to be in the employ of the city constructed a box-gutter across said street and across the land in question to the bed of a larger creek, which flowed through

said lands from the south. Said land at that time was owned by one A. Mier, who continued to own it until the year 1888. Mier made no objection to the water being turned upon the land, and it was running across the same in the box-gutters at the time of its purchase by the respondent. As soon as the latter purchased the land, he constructed, without any permit from the city authorities, an open gutter down the east side of said Fifteenth Street and turned the water into the same. Soon thereafter complaint was made to the superintendent of streets of the city by property owners on said street about the water running down the street where respondent had turned it, and he ordered it turned back; and parties came and sawed his open gutter in two, and turned the water back on respondent's land, where it was when he constructed the gutter. It also appears from the bill of exceptions that the creek which flowed across respondent's land from the south was a continuous stream, having quite a wide channel, and emptied into what is known as Tanner's Creek; that the said surface water, before the said improvement of Fifteenth Street was made by the city, flowed across the land within a few feet of the place where it was made to flow by the construction of the box-gutter, and that it spread out over more ground as it formerly ran than it did after it was confined. Nor was there any evidence tending to show that the running of the water affected the land more injuriously by being confined in a box-sewer than it did when allowed to run at large, although said Mier testified that he considered the box-gutters a damage to the property; nor was there any evidence of damage to the land by the flowing of the water across it, except that a witness for the respondent was allowed by the court to be asked what it would cost to take care of the water turned upon the land, to which he answered that it would take sixty to seventy dollars to take care of it. This testimony, however, was taken under an objection interposed by appellant's counsel, and an exception was taken to the ruling of the court thereon. There was also evidence tending to show that the gutters along the sides of said Fifteenth Street were allowed to become clogged with mud and gravel, and that if kept clean would convey away all the water.

After the respondent rested his case, counsel for appellant moved for a nonsuit on the ground that the water in question was surface water, and the city was not liable for its flowing on respondent's land in any event, and that the appellant had

not been shown to be connected with the turning of the water upon the land and no damages were proven to have been sustained by respondent. The court overruled the motion, and the appellant's counsel excepted to the ruling.

It is quite evident that the improvement of Fifteenth Street by the city necessarily interfered with the natural flow of the surface water which ran from the west side of the street eastward over the land in question to the creek which ran through the land from the south. The street ran north and south, and when graded, the water was turned northward down the gutter on the west side of it. The city authorities intended in the outset to use that gutter as a means of conveying away the water which came down from the west, but it was soon ascertained that it would be impracticable to do so, as it affected the street, and lot-owners below, seriously. They then resorted to the method of running the water across the street at the most convenient point; and from thence, by means of the box-sewer, through the respondent's land to the said creek at or near the place where it had formerly flowed. The respondent, after purchasing the land from Mier, conceived the idea of turning the water down the east-side gutter of the street and thereby prevent its running across his land, which he proceeded to do. The result was, that it affected the lot-owners below on that side of the street and caused complaint to be made to the city authorities, who thereupon turned it back again through the box-gutter. Upon what ground the respondent, in view of the facts, could predicate a right of action against the city, is very difficult to discover. The city had an undoubted right to improve the street, and unless it was guilty of negligence in the execution of the work, the respondent had no legal cause for complaint. Parties owning property within the corporate limits of a city are necessarily compelled to submit to many inconveniences which the grading and improvement of streets occasion. Building up a city is liable to incommode the owners of land situated within it in certain respects, but they are amply compensated therefor by the enhanced value of the property and by numerous benefits they indirectly receive in return. The owners cannot be deprived of the property nor of its permanent enjoyment without just compensation, but they may be compelled to use it in conformity with general regulations established to promote the welfare of the community.

The learned circuit judge who presided at the trial of the

case instructed the jury that they were to decide from the evidence whether the water in question was surface water or a well-defined stream, and if they found that it was a well-defined stream with a marked channel, then, if the appellant had diverted it from its natural channel, and caused it to flow in a channel not substantially the same as that in which it naturally flowed, and the respondent had sustained damages thereby, the appellant was liable for such damages, and their verdict should be for the respondent in the amount to which he had been damaged thereby. This instruction was not authorized by the pleadings or evidence in the case. The water was described in both complaint and answer as surface water which flowed during the rainy season, and there was no evidence that the respondent was damaged in consequence of its course being diverted from that in which it had been accustomed to run. There was not in fact any evidence that there had been a material diversion of its course; confining it in a box-gutter rendered it less liable to do damages to the respondent's land than if it were allowed to spread over the land.

Municipal corporations have been held liable for damages resulting to private property, where, in the improving of their streets, they have interfered with the flow of a natural stream of water; but the evidence in this case does not show that the water in question constituted a natural stream, nor was it so claimed by the respondent's counsel at the hearing.

The judgment appealed from must therefore be reversed, and the case remanded to the circuit court, with directions to dismiss the complaint.

MUNICIPAL CORPORATIONS — SURFACE WATER. — While making lawful improvements in its streets, a city is not responsible for damages necessarily resulting from an overflow of surface waters: *Davis v. City of Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 361, and note; *Heth v. City of Fond du Lac*, 63 Wis. 228; 53 Am. Rep. 279; *Mayor v. Willison*, 50 Md. 138; 33 Am. Rep. 304, and foot-note; *Imler v. City of Springfield*, 65 Mo. 119; 17 Am. Rep. 645, and foot-note; *Wilson v. Mayor*, 1 Denio, 595; 43 Am. Dec. 719, and note 723, 724; *Mayor v. Randolph*, 4 Watts & S. 514; 39 Am. Dec. 102.

FORBES v. WILLAMETTE FALLS ELECTRIC COMPANY.

[19 OREGON, 61.]

MECHANIC'S LIEN — ELECTRIC APPARATUS SUBJECT TO. — Poles planted in the ground, connected together by means of wire and insulators, for the purpose of transmitting electricity for light and power and for other purposes, constitute a structure within the meaning of section 3669, Hill's Oregon Code, relating to mechanics' liens, and are subject to a lien for labor performed thereon.

MECHANIC'S LIEN — EVIDENCE TO ESTABLISH. — Time-checks given by a contractor to his laborer are not conclusive evidences of labor performed, against the owner of the subject of a mechanic's lien, but are declarations of the latter's agent in the line of his employment, and sufficient to establish the claim to such lien, in the absence of evidence to the contrary.

MECHANIC'S LIEN — ATTORNEY'S FEE. — Where the statute allows the court to tax an attorney's fee in favor of the claimant in case of the foreclosure of mechanics' liens, a fee of ten dollars for each claim foreclosed is not an unreasonable allowance.

MECHANIC'S LIEN — FORECLOSURE — INTEREST. — Upon the foreclosure of mechanics' liens, interest should be allowed on each claim from the date of filing the notice of lien.

SUIT to enforce mechanics' liens. The plaintiff, as assignee of a number of claims for labor performed for one Stronach, alleged that the latter had a contract with the defendant to place poles in the ground and stretch wires on the same from Portland to Oregon City, for the purpose of transmitting electrical light and power from the defendant's works.

J. C. Moreland, for the appellant.

C. D. Young, for the respondent.

STRAHAN, J. The plaintiff's right to the remedy which he seeks must depend on the statute. Section 3669, Hill's Code, provides: "Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, and other person performing labor upon or furnishing material of any kind to be used in the construction, alteration, or repair, either in whole or part, of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or superstructure, shall have a lien upon the same for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, and every contractor, subcontractor, architect, builder, or other person having charge of the construction, alteration, or repair, in whole or in part, of any building or other improvement as aforesaid, shall

be held to be the agent of the owner for the purposes of this act."

The principal question litigated on this appeal is, whether or not this statute gives a lien for labor against the property described in the complaint; in other words, do these poles, planted in the ground, connected together by wires and insulators, constitute a structure, within the true intent and meaning of this statute? In answering this question, but little aid can be had from the decisions of other states, for the reason that no general principle of law is involved, and such decisions have generally turned upon the special or peculiar phraseology of the particular statute. Without attempting to indulge in any refined distinctions or definitions, and having in view the object and purpose of the enactment in question, I think it may properly be held that the poles, wires, insulators, etc., mentioned in the complaint, constitute a structure within the meaning of the statute, and that the same is subject to a lien for labor performed thereon.

In reaching this conclusion, we do not find it necessary to go as far as the court did in *Helm v. Chapman*, 66 Cal. 291, where it was held that a mine or pit sunk within a mining claim was a structure within the meaning of the statute giving a lien on a building, improvement, or structure.

2. Some question was made as to the insufficiency of the evidence to establish some three or four of these claims; but I think the objection cannot be sustained. It is shown that Stronach had a contract with the defendant corporation to do the work; that these men each worked on the job under the directions of Stronach or his foreman, and received time-checks showing the amount due each; that they filed proper notices of lien; and in most cases the exact number of days and the amount agreed to be paid is fully proven.

The defendant offered no evidence, and what was offered by the plaintiff does not seem to be discredited in any way. Stronach's time-checks are not conclusive against the defendant, but they are declarations of the defendant's agent in the line of his employment; and are to be considered for what they are worth. Any dishonesty or bad faith on his part in the transaction would greatly impair their credit and weaken their force; but we perceive nothing of that kind in this case.

3. The statute allows the court to tax an attorney's fee in favor of the claimant in case of the foreclosure of liens under

the act, and in this case the court allowed a fee of ten dollars for each claim. We do not think this an unreasonable sum.

4. The respondent claims interest on each claim from the date of the filing of notice. There seems to be no valid objection to this claim, and it will be allowed.

It was said by this court in *Willamette Falls T. & M. Co. v. Riley*, 1 Or. 183, that claims for which mechanics may have liens are certainly as much entitled to draw interest after they become due as any other; and we cannot think that for the recovery of such interest it would be necessary to bring a separate suit, or take a separate judgment, but conclude that interest may be computed on lienable demand, and a lien awarded for the entire amount.

The decree will therefore be modified so as to allow lawful interest on each demand from the date of filing notice of the lien, and in all other respects the decree is affirmed.

MECHANIC'S LIEN — WHAT IS SUBJECT TO. — As to what property may be subjected to a mechanic's lien, see *Harrison v. Homoeopathic Ass'n*, 134 Pa. St. 558; 19 Am. St. Rep. 714, and note. An electric-light plant is property against which a mechanic can file a lien for work and materials furnished in building or repairing it: *Mulholland v. Thomson-Houston Electric Co.*, 66 Miss. 339. So is a mining claim: *Silvester v. Coe Quartz Mne Co.*, 80 Cal. 510; fixed machinery: *Griggs v. Stone*, 51 N. J. L. 549; or a railroad: *Midland R'y Co. v. Wilcox*, 122 Ind. 84; *St. Louis etc. R'y Co. v. Mathews*, 75 Tex. 92. Compare note to *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Am. Dec. 694-699, as to what structures are subject to a mechanic's lien.

MECHANIC'S LIEN — FORECLOSURE. — A reasonable attorney's fee in an action to foreclose a mechanic's lien is not part of the costs, but an incident to the foreclosure of the lien: *McIntyre v. Trautner*, 78 Cal. 449; and the fee may be made to include an attorney's additional services rendered in managing the case on appeal to the supreme court: *Smith v. Solomon*, 84 Cal. 537.

SAVAGE v. SAVAGE.

[19 OREGON, 112.]

PARTITION — RIGHT OF REMAINDERMAN OR REVERSIONER TO MAINTAIN. —

Under the Oregon code, a remainderman or reversioner cannot maintain partition against the tenant for life in possession. They may be made defendants in such suit, but cannot sue as plaintiffs therein.

PARTITION — WHO MAY MAINTAIN. — Under the Oregon code, the right to sue in partition is given only to one having the actual or constructive possession of land sought to be partitioned.

SEISIN AND POSSESSION MEAN THE SAME THING. — Seisin in fact consists of actual possession of the land. Seisin in law consists of the right of immediate possession according to the nature of the interest. Remaindermen or reversioners have neither.

PARTITION — RIGHT OF ENTRY NECESSARY TO MAINTAIN. — When the tenant for life is in possession, and there is no present right of entry in the remainderman or reversioners, they are not constructively seised of the land, and neither can maintain a suit as plaintiff for partition.

W. H. Holmes, for the appellant.

J. J. Murphy, for the respondents.

STRAHAN, J. It was conceded upon the argument of this cause that the defendant Ellen Savage has a life estate, with all of its incidents, in the land sought to be partitioned, and that the plaintiff, with the defendants, except Ellen Savage, have either the remainder or reversionary interest therein, and none other, and the question presented and argued was whether or not, under such state of facts, the plaintiff could maintain this suit.

The right to the partition of lands is regulated by statute in this state, and consequently an examination of the sources of jurisdiction, and whether it was originally at law or in equity, or was exercised concurrently by both jurisdictions, would be unprofitable. Section 423 of Hill's Code provides: "When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, a suit may be maintained by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners." This provision has been the law here ever since the 22d of December, 1853, at which time it was enacted by the territorial legislature, and by its terms took effect on the first day of May, 1854: Laws of Oregon, 1855, pp. 152, 159.

It was copied almost literally from the Code of Civil Procedure of the state of New York: New York Annotated Code, sec. 1532.

Before proceeding to an examination of the provision of the code, it may be well to see what was the rule prior to its enactment. In *Evans v. Bagshaw*, L. R. 5 Ch. 340, the court said: "The case therefore falls within the ordinary rule that the court will not allow a partition suit to be maintained by a reversioner. This rule is not merely technical, but is founded on good sense in not allowing the reversioner to disturb the existing state of things. There might be a tenant for life of

the whole, and several tenants in common in reversion, in which case the inconvenience would be obviously very great. At all events, the rule is unquestionably settled." And this was affirmed on appeal: L. R. 8 Eq. 469. The very case supposed by the court is actually presented by this record. So in *Striker v. Mott*, 2 Paige, 387, 22 Am. Dec. 646, it was held that a party who had a future contingent interest in an undivided share of real estate could not sustain a suit for partition of the property.

This case was decided in 1831. *Brownell v. Brownell*, 19 Wend. 367, involved the same question, and arose under the statute rendering possession necessary to the maintenance of the suit, and while holding that an actual *pedis possessio* was not necessary, still the plaintiff must then have been entitled to the possession, and that she would not be entitled until after the termination of the estate for lives; and that a partition made at that time might be a very unequal one at the termination of such lives. The distinct question here presented came finally before the court of appeals in *Sullivan v. Sullivan*, 66 N. Y. 37, and the decision was adverse to the views of the appellant in this case.

The distinction drawn by most of the authorities in relation to remaindermen and reversioners as plaintiffs and defendants must not be overlooked. It is the gist of the present controversy. It is conceded by all the authorities, and I think plainly provided for in the statute, that they may be made defendants, and the effect of a decree against them as well as others is declared by section 432 of Hill's Code; but in this state there is no provision of law which enables them to come into court as plaintiffs and compel the tenant for life to submit to a partition.

In *Sullivan v. Sullivan*, 66 N. Y. 37, it was held that although remaindermen and reversioners might be made parties defendant to an action, they could not institute the action, at least as against others not seised of a like estate in common with them. The right is only given to one having actual or constructive possession of the lands sought to be partitioned. A remainderman has neither, but simply an estate to vest in possession *in futuro*. And the court said: "There was no tenancy in common by the plaintiff with either of the defendants, and the plaintiff did not hold and was not in possession, either actually or constructively, of any part of the lands sought to be partitioned. We think it too well settled by au-

thority, as well as upon principle, that a remainderman cannot, against others not seised of a like estate in common with him, maintain the action to disturb the rule. If the action should be extended, and the benefit given to other parties, it must be done by legislation." No doubt, acting upon the suggestion of the court in this case, the legislature of the state of New York thereafter amended section 1533 of the Code of Civil Procedure, whereby it was provided: "Where two or more persons hold as joint tenants or as tenants in common a vested remainder or reversion, any one or more of them may maintain an action for the partition of real property to which it attaches, according to their respective shares therein, subject to the interest of the person holding the particular estate therein, but no sale of the premises in such action shall be made except by and with the consent, in writing, to be acknowledged or proved and certified in like manner as a deed, to be recorded by the person or persons holding such particular estate or estates; and if in such action it shall appear in any stage thereof that partition or sale cannot be made without great prejudice to the owners, the complaint must be dismissed."

Now, if the rule contended for so ably by appellant's counsel had prevailed in New York prior to the enactment of this statute, its enactment was superfluous and wholly unnecessary. It was passed, not to settle a disputed question of law, but to confer a new right upon remaindermen and reversioners after it had been solemnly adjudged by the court of last resort that they did not possess such right under the then existing law, and the recognition of such right here by the court would be nothing less than plain judicial legislation. It would amount to the introduction of the rule here by the court which required an express act of the legislature in the state of New York to introduce there.

Seisin and possession, as now understood, mean the same thing. To constitute seisin in fact, there must be an actual possession of the land; for a seisin in law, there must be a right of immediate possession according to the nature of the interest, whether corporeal or incorporeal: 1 Washburn on Real Property, 62.

Under this view there can be no seisin in law where there is not a present right of entry. And where the life tenant is in possession, and there being no present right of entry in the remainderman or reversioner, they are not constructively

seised, and neither can maintain a suit as plaintiff for partition. The authorities generally sustain this view: *Bonner v. Proprietors of Kennebeck*, 7 Mass. 475; *Rickard v. Rickard*, 13 Pick. 251; *O'Dougherty v. Aldrich*, 5 Denio, 385; *Burhans v. Burhans*, 2 Barb. Ch. 398; *Whitten v. Whitten*, 36 N. H. 326; *Stevens v. Enders*, 13 N. J. L. 271; *Tabler v. Wiseman*, 2 Ohio St. 207; 3 Pomeroy's Eq. Jur., sec. 1388, note 1.

Counsel for appellant claims that because persons owning interest in remainder or reversion are mentioned in section 432, Hill's Code, as defendants who are bound by the decree, that therefore the same persons may be plaintiffs; but the conclusion does not follow. One conclusive answer to this argument is, that the legislature has not seen proper to open the door wide enough to let them into court as plaintiffs, but has, by the section referred to, and other sections in the same connection, authorized such persons to be made defendants. Counsel for appellant also referred to the opinion of Denio, C. J., in *Blakeley v. Calder*, 15 N. Y. 617, with much confidence. That opinion, if law, does sustain the appellant's contention; and while it was delivered by a very eminent jurist, and was concurred in by others equally distinguished, it was not then adopted as law by the court, and has never received the sanction of the court in which it was pronounced.

We think the decree appealed from is correct, and must be affirmed.

PARTITION, WHO MAY MAINTAIN. — Remaindermen or reversioners cannot compel partition against tenants in possession for a term of years, for life, or in fee: Note to *Nichols v. Nichols*, 67 Am. Dec. 703; *Smalley v. Isaacson*, 40 Minn. 450. The petitioner must be entitled to the right of the entry at the time of filing his petition for partition: Note to *Nichols v. Nichols*, 67 Am. Dec. 712; *Cooper v. Fox*, 67 Miss. 237.

SEISIN AND POSSESSION DO NOT MEAN THE SAME THING; seisin is the possession of a freehold estate created at common law by livery of seisin: *Ferguson v. Witsell*, 5 Rich. 280; 57 Am. Dec. 744.

DEERING & Co. v. CREIGHTON.

[19 OREGON, 118.]

NEGOTIABLE INSTRUMENTS—EFFECT OF INDORSEMENT BY THIRD PERSON.

—A third person who indorses a negotiable note concurrently with its execution, and at or before its delivery to the payee or indorsement by him, is presumptively liable only as a second indorser, but may be shown by parol evidence to be liable as a joint maker or guarantor, according to the intention of the parties as disclosed by the facts. In such case, however, it is essential to a recovery against such third person as an original promisor or joint maker, that the complaint contain special averments of the facts which operate to charge him as such, instead of as an indorser.

ACTION to recover on promissory notes in the usual form, payable to the order of plaintiffs. The notes were signed by different parties as makers, and indorsed on the back at the time of execution, and before delivery to the payees, as follows: "For value received, we hereby waive protest, demand, and notice of non-payment." The reply to the answer admitted these facts, and alleged that the indorsements were made for the purpose of giving the makers credit with plaintiffs, and in payment of machinery sold by defendants on commission. The matter in the reply was demurred to, and a motion made to strike it out. This was overruled by the court, and judgment rendered for the plaintiffs, from which the defendants appealed.

L. Flinn and J. W. Rayburn, for the appellants.

W. S. McFadden and J. R. Bryson, for the respondents.

LORD, J. The principal question arises out of the decision on the demurrer to the matter set up in the reply as inconsistent with the facts alleged in the complaint; or, to raise the same question in another form, that the complaint does not state facts sufficient to show that the defendants are original promisors or joint makers. Taking the note as it stands, what is its legal effect? Are the defendants joint makers, guarantors, or indorsers? The liability created by such an indorsement presents an important and perplexing question, in which the conclusions of the courts are at variance. Such indorsements are regarded as irregular or anomalous, and the person so indorsing a *quasi* indorser.

There is but little doubt that the weight of authority is, that a third person who indorses a note at the time of its execution, and before its delivery to the payee, will be pre-

sumed an original promisor or joint maker. Mr. Lawson says: "In a few of the states, as well as in England, he *prima facie* incurs the liability of an indorser, but parol evidence is admissible to prove the intention of the parties, which, when ascertained, determines his liability." But he adds: "By the weight of authority, he is liable as joint promisor or co-maker, if he indorsed the note before it was issued; but if shown to have indorsed it after its issue, he is liable as a guarantor; but in both cases evidence is admissible of the real intention of the parties, which, when ascertained, determines his liability": Lawson's Rights and Remedies, sec. 1575, and note of authorities; note to *Andrews v. Congar*, 20 Am. Law Reg. 331, where the authorities are carefully collected and distinguished by states; Tiedeman on Commercial Paper, secs. 270, 272. In this state, where a third person indorses a bill or note before it is delivered to the payee or indorsed by him, he is *prima facie* liable as a second indorser.

In *Kamm v. Holland*, 2 Or. 60, the question was presented as to the liability a third party assumed who indorses his name in blank on the back of a negotiable paper before it is delivered to the payee and indorsed by him, and the court held that he became liable as an indorser, and as such was entitled to due demand and notice of non-payment. So in *Cogswell v. Hayden*, 5 Or. 23, the court says: "The only presumption that can arise from Cogswell's indorsement is, that he intended to become a second indorser."

For its reason the court adopted the reasoning assigned in *Bacon v. Burnham*, 37 N. Y. 616, that "it must be supposed, in the absence of any proof to the contrary, that perceiving the name of the payee in the note, he indorsed it on the presumption that the name of such payee, to whose order it was made payable, would also, at some time, appear on the note, for only thus would it become negotiable." See also *Barr v. Mitchell*, 7 Or. 346. So that whatever diversity of opinion may exist, or how—was the question *res integra*—we might be disposed to regard such liability in the absence of explanatory evidence, the rule of commercial law in this particular must be considered as settled.

But while, in such case, when a third person indorses a note concurrently with its execution, and at or before its delivery to the payee, the liability assumed is presumptively that of an indorser, it may be shown by parol evidence to be

the liability of a joint maker, or guarantor, according to the intention of the parties as disclosed by the facts. Looking at the note with its indorsement, and upon the facts as alleged, the defendants were presumptively liable as indorsers who waived demand, protest, and notice of non-payment. In the light of our adjudications, they cannot be regarded *prima facie* as joint makers, because, according to the reason assigned, in the absence of explanatory evidence, the presumption is, that the defendants supposed that they would incur no liability until after the payee had first indorsed.

According, then, to the facts as alleged in the complaint they are liable as indorsers, while by virtue of the facts as alleged in their reply the defendants are liable as joint makers, and the plaintiffs have recovered against them as such for that reason. This is inconsistent. Upon the complaint as it stands, there could be no such recovery, but the reply cannot obviate this defect or vary the liability. It is a part of the plaintiff's case, and the necessary facts must be alleged and proved, to establish such liability. In a word, the plaintiffs cannot recover in such case, unless their complaint contain special averments showing the facts relative to the transaction which operate to charge the defendants as original promisors or joint makers. Mr. Lawson cites numerous cases showing, in respect to these irregular indorsements, that parol evidence is admissible to prove the intention of the parties, which, when ascertained, determines their liability, but the cases cited also show that the facts were alleged in order to sustain such a recovery: *Lawson's Rights and Remedies*, sec. 1575, and note of authorities.

The complaint in *Moore v. Cross*, 19 N. Y. 227, 75 Am. Dec. 326, alleged the facts that the indorsement was made for the purpose of paying for coal sold and delivered by the plaintiff to the defendant on the credit of such indorsement, etc., and is referred to and adopted in 1 Abbott's Forms, page 237, for the purpose of showing the facts necessary to be averred in such case. As the plaintiffs claim that the defendants were joint makers of the note, and that such was their understanding and contract, these are facts necessary to be averred in their complaint, and the defect was not obviated by their statement in the reply. It made the reply inconsistent with the complaint, which, upon the facts as alleged, established a different liability. The demurrer to the new matter set up in the reply should have been sustained.

It follows that the judgment must be reversed, and the case remanded for such further proceedings as may be proper in the premises.

NEGOTIABLE INSTRUMENTS — INDORSEMENT BY A THIRD PARTY. — One who indorses a note before it has been indorsed by the payee, who subsequently indorses it, is ordinarily liable only as a second indorser: *Note to Central Nat. Bank v. Dreydoppel*, 19 Am. St. Rep. 714; *Brewer v. Boynton*, 71 Mich. 254. But parol evidence may be admitted to show a special collateral agreement concerning the character which such indorser should sustain to the note: *Schafer v. Farmers' etc. Bank*, 59 Pa. St. 144; 98 Am. Dec. 323; *Kayser v. Hall*, 85 Ill. 511; 38 Am. Rep. 624; *Phelps v. Vischer*, 50 N. Y. 69; 10 Am. Rep. 433. In *Sweet v. Woodin*, 72 Mich. 393, it is decided that a second indorser, by putting his name above that of the payee, who had indorsed the note for accommodation, makes himself a joint maker, and disqualifies himself from recourse to the first indorser as liable to him in the order of time.

HALL v. STEVENSON.

[19 OREGON, 153.]

ATTACHMENT — SUFFICIENCY OF RETURN. — Where the service of an attachment in case of real property is required to be made by leaving a copy of the writ with the occupant thereof, or if there is no occupant, by leaving a copy in a conspicuous place thereon, a sheriff's return upon the writ which fails to show that the defendant, to whom a certified copy was delivered, was an occupant of the land sought to be attached, or that there was no occupant of such land, or that a certified copy of the writ posted on the front of defendant's dwelling-house was posted in a conspicuous place on such premises, is insufficient.

ATTACHMENT. — SEVERAL SEPARATE AND DISTINCT PARCELS OF LAND CANNOT BE ATTACHED by posting a copy of the writ of attachment on one of them only.

ATTACHMENT — REMOVAL OF CAUSE — AMENDMENT OF RETURN. — The state court has no authority to permit a sheriff to amend an insufficient return made by him on a writ of attachment after the cause has been regularly removed from the state court into the circuit court of the United States. Upon such removal of the cause, the jurisdiction of the state court over it ceases.

LIENS — ORDER OF PAYMENT. — Where plaintiff has a prior mortgage lien on two parcels of land, while defendant has a second judgment lien on one of the parcels only, the land which is subject to the mortgage lien alone should be first sold, and the proceeds applied on the mortgage, and the land which is subject to both liens should then be sold, and the proceeds applied to pay anything remaining due on the mortgage, and the remainder should be applied to the payment of the judgment lien, and if anything then remains, it should be deposited in court for whoever may be entitled thereto.

SUIT to foreclose a mortgage executed by G. H. Stevenson and F. M. Gabbert. Defendants Christy and Wise are alleged

in the complaint to have some interest in the mortgaged land subsequent and subject to the mortgage lien. They denied that their claim was subject to the mortgage lien, and alleged that they commenced suit against said Stevenson and others to recover a certain sum; that an attachment was duly issued and executed by the sheriff on all the title and interest of said Stevenson in said mortgaged real estate; that upon the return of the attachment, Christy and Wise acquired a valid lien upon said land; that thereafter said cause was duly removed to the circuit court of the United States; that thereafter they recovered judgment therein that said land be sold to satisfy said judgment. Upon the hearing of the case, judgment was rendered in favor of the defendants, and plaintiff appealed from so much of the decree as allowed the sheriff to amend his return on the writ of attachment after the removal of the prior case into the United States circuit court, from so much of such decree as directed the order in which the mortgaged property should be sold, and also from so much of it as decided that Christy and Wise's attachment is a prior lien to plaintiff's mortgage. The remaining facts are stated in the opinion.

J. W. Hamilton and W. R. Willis, for the appellant.

S. B. Linthicum, for the respondents Christy and Wise.

STRAHAN, J. There are two tracts of land involved in this suit: 1. A tract containing 1,553.87 acres; 2. A tract containing 680 acres. The defendant Stevenson owned an equal undivided one half of each of these tracts, and Mr. F. M. Gabbert owned the remaining moiety. There is still another tract, of about five hundred acres, described in the complaint, which was owned mainly by the defendant Stevenson, though he seems to imply from his evidence that one Lydia Dascomb owned a small undivided interest therein, but that he had bargained for it in some way, the particulars of which do not appear.

The mortgage sought to be foreclosed was executed sometime about two or three o'clock, p. m., on the fourth day of October, 1886, and after the attachment papers were delivered to the defendant Stevenson. He received these papers from the sheriff, in the lane in the southern part of the town of Roseburg. The mortgaged premises were situated about thirteen miles from this point. The individual land of Stevenson joins the fifteen-hundred-acre tract owned in com-

mon with Gabbert, and the distance between the six-hundred-and-forty-acre tract and the fifteen-hundred-acre tract is about one fourth of a mile.

The sheriff by his return on the writ of attachment certifies as follows: "And I further certify that I did, on the said fourth day of October, 1886, by virtue of said annexed writ of attachment above described, attach the following described real property of George Stevenson, one of the defendants named in said annexed writ of attachment, subject to the former attachment of Koshland Brothers, hereinbefore mentioned. I did, in pursuance of said annexed writ of attachment, on the said fourth day of October, 1886, at 8:30, A. M., of said day, attach the following described real property by delivering to said George Stevenson in person a copy of the annexed writ of attachment, duly certified to by me as sheriff aforesaid, and thereafter, to wit, at 1:30 o'clock, P. M., of said fourth day of October, 1886, I duly posted a copy of said annexed writ of attachment, duly certified to by me as sheriff, upon the front of the dwelling-house of said George Stevenson, within said county and state, as no person could be found at the place of residence of said defendant George Stevenson of suitable age and discretion with whom to leave said copy of said writ of attachment, as aforesaid."

No other fact appears in the return showing the manner of service. On the ninth day of October, 1886, the sheriff made out a certificate certifying, in effect, that he had attached all the real property described in the complaint as the property of the defendant George H. Stevenson, which certificate was filed with the county clerk on that day, and by him recorded.

The only questions we deem necessary to consider are, whether the return was sufficient to show the property in controversy had been attached, or if the same be deemed insufficient, whether the attempted amendment thereof in this case can be sustained.

1. Section 149, Hill's Code, provides: "The sheriff to whom the writ is directed and delivered shall execute the same without delay, as follows: 1. Real property shall be attached by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the sheriff."

The return of the sheriff fails to show that George H. Stevenson was an occupant of the premises sought to be attached, and it does not appear that the copy of the writ was posted in

a conspicuous place on said premises. The sheriff returns that it was posted "upon the front of the dwelling-house of said George H. Stevenson, within said county and state," but it does not appear that said dwelling-house was the property sought to be attached, or that the front of said dwelling-house was "a conspicuous place."

The sufficiency of a return much like this came before the circuit court of the United States for this state in *Mickey v. Stratton*, 5 Saw. 475, and was held insufficient. The learned and distinguished judge of said court, after citing *Trullenger v. Todd*, 5 Or. 39, said: "Now, the analogy between these cases and the one at bar is complete. The service of an attachment, in case of real property, is required to be made by leaving a copy of the writ with the occupant thereof, but if there be no occupant, then, and in that case only, by leaving a copy in a conspicuous place thereon. The law is framed on the reasonable assumption that the occupant represents the absent owner, and therefore it requires the service to be made upon him; and no substituted service, by leaving a copy of the writ on the premises, is permissible unless there is no one in the occupation of the premises upon whom service can be made, and that fact appears from the return, or else the service upon its face is unauthorized and invalid. Further, the return must state what was done, and the presumption that an officer has done his duty is not sufficient to supply a material fact or circumstance which does not appear in his return. For the law having made it his duty to indorse his proceedings under the writ thereon, the presumption that he did his duty applies as well to the making of the return as the service of the writ, and therefore there is no room to presume that he did his duty in making the service more fully, or otherwise, than he has stated in his return."

If this is the correct construction of the statute, and there is no reason to doubt it, it is decisive of this question. But there are other authorities to the same effect: *Bryan v. Trout*, 90 Pa. St. 492; *Page v. Generes*, 6 La. Ann. 549; *Ezelle v. Simpson*, 42 Miss. 515; *Tucker v. Byars*, 46 Miss. 549.

It was also argued that if the court should be of the opinion that this return was sufficient to make a valid attachment of Stevenson's individual land, it was not good as to those tracts in which he owned only an undivided interest, and particularly the tract that did not join the others or have any connection whatever therewith, and this contention of the ap-

pellant I think would have to be sustained, but its consideration is unnecessary. Several separate and distinct parcels of land could not be attached by posting up a copy of the writ on one only of them: *Henry v. Mitchell*, 32 Mo. 512.

The sheriff's return was therefore insufficient to show that the lands in controversy had been attached at the suit of Christy and Wise.

2. The remaining question is, Was such return amendable? and were the proper proceedings taken in the court below to amend the same? If the cause in which the defective return was made had not been removed into the circuit court of the United States for the district of Oregon, and the rights of other parties had not intervened, then, if the facts existed which would have enabled the sheriff to make a good return on the writ of attachment, the court might have permitted him to do so. But by what authority did the circuit court of Douglas County proceed to amend a process in a cause which had been lawfully removed into the federal courts?

"If the record discloses a removable cause, and the other conditions have been complied with, the jurisdiction of the state court ceases, and that of the federal court attaches without any further proceedings and for all subsequent purposes": *Dillon's Removal of Causes*, sec. 77 b.

The power of the state court had therefore ceased over the case of *Christy and Wise v. G. H. Stevenson et al.* long before this attempted amendment of this return in that case, and the court had no power whatever over said cause or any process issued therein. After the removal it belonged to the federal court to exercise the power of amendment if it thought proper to do so, to the same extent and as fully as if said cause had been originally commenced in that court.

This view of the subject renders it unnecessary to discuss the question whether as against these plaintiffs the return was amendable, and whether or not the order of amendment could be made in this case; but I think proper to add that the mode of procuring an amendment of process or return is generally to proceed upon notice in the cause where such defect occurs.

3. One other question remains to be considered, and that is, the order in which the mortgaged premises shall be sold. Christy and Wise have a judgment which, so far as appears, is a second lien on Stevenson's land and upon the undivided half of the tracts which he holds as tenant in common with Gabbert, and they have no lien on Gabbert's interest therein.

In such case it is equitable that the lands upon which Christy and Wise have no lien should be first sold, and the proceeds arising therefrom be applied to the payment of the plaintiff's mortgage, interest, and costs, and the residue of the proceeds of Stevenson's interest, if any, be applied upon the judgment of Christy and Wise, and that the remainder of said real estate be also sold, and the proceeds be applied, first, to the payment of any balance that may be due the plaintiff on said mortgage, if any, and the residue to the payment of the judgment of Christy and Wise, mentioned in the pleadings, and the remainder, if any, be deposited in the circuit court of Douglas County to be paid out to whoever may be entitled to receive the same, and that the mortgage described in the complaint be foreclosed, etc.

The decree of the court below will be modified as herein indicated.

ATTACHMENT—SUFFICIENCY OF THE RETURN.—Statutes authorizing attachments must be strictly construed, and no attachment will be sustained unless all the statutory requirements have been strictly complied with: *First Nat. Bank v. Moss*, 41 La. An. 227; *Wando Phosphate Co. v. Rosenberg*, 31 S. C. 301. The sheriff's return must show conformity to the statutory requirements, in substance at least: *People's Bank v. West*, 67 Miss. 729; *Sherman v. Bank*, 66 Miss. 648; *Robertson v. Hoge*, 83 Va. 124. A general return is insufficient; the officer must specifically state in his return the particular acts performed by him in serving the writ: *Brusie v. Gates*, 80 Cal. 462. In *Davis v. Baker*, 72 Cal. 494, where the sheriff's return to an attachment writ stated that on a certain day he duly levied the same upon the land therein described by posting a copy of the writ, attached to a notice notifying the defendant that said property was attached, on the premises, it was decided that the return was *prima facie* evidence sufficient to support the levy, even though it did not state that the papers had been posted in a conspicuous place on the land. So where a return shows that the sheriff attached certain realty, and in fact took it into his possession, and left a true copy of the attachment order, but does not show in so many words that he left a copy of the order with an occupant, or if there was no occupant, in a conspicuous place upon said real estate, it will be presumed that the sheriff did his duty in serving the writ, and that the service was legally made: *Wilkins v. Tourtellott*, 42 Kan. 177. A return of a writ of attachment that it had been served by posting a copy thereof on the attached premises is sufficient, without stating that they were unoccupied at the time: *Ritter v. Scannell*, 11 Cal. 238; 70 Am. Dec. 775. Where the return is sufficient as showing a valid levy upon wild or unoccupied land, the character of the attached land not appearing, it will be presumed that the land was unoccupied, and the levy will be upheld: *Drysdale v. B. C. Co.*, 67 Miss. 534. A levy upon a tract of land subdivided into town lots must show that each separate parcel was levied upon: *San Antonio etc. R'y Co. v. Harrison*, 72 Tex. 478. There is a natural presumption in favor of the discharge of official duties by officers serving writs of attachment: *Hitchcock v. Hahn*, 60 Mich. 459. Service of an attachment writ by an officer *de*

facto is valid as to the rights of other persons: *Stickney v. Stickney*, 77 Iowa, 699.

The return of an officer to an attachment writ is evidence of the service of the writ: *Boyd v. Chesapeake etc. Canal Co.*, 17 Md. 195; 79 Am. Dec. 646; but where the officer is a party, the return by him is merely *prima facie* evidence of an attachment: *Nichols v. Patten*, 18 Me. 231; 36 Am. Dec. 713. Ordinarily, however, a sheriff's return to an attachment writ is conclusive as between the parties and their privies, though only *prima facie* evidence as to third persons: *Chadbourne v. Sumner*, 16 N. H. 129; 41 Am. Dec. 720. The officer's return does not preclude the execution creditor from showing that from an omission of the officer to take possession of property no attachment had been in fact made: *Root v. Railroad*, 45 Ohio St. 222.

A sheriff's return to a writ of attachment may be amended by permission of the court; and is conclusive against the sheriff only as amended: *Cody v. Quinn*, 6 Ired. 191; 44 Am. Dec. 75. A mistake in the date of a return to an attachment writ may be corrected at any time: *Ritter v. Scannell*, 11 Cal. 238; 70 Am. Dec. 775, and note. Compare *Jeffries v. Rudloff*, 73 Iowa, 60; 5 Am. St. Rep. 654.

WEIDERT v. STATE INSURANCE COMPANY.

[19 OREGON, 261.]

INSURANCE — CONSTRUCTION OF CONTRACT — POWER OF AGENTS. — Contracts of insurance must have effect like all other written contracts. The intention of the parties must govern, and when the language is plain and unambiguous, such intention must be gathered from such language. The court simply ascertains the language the parties themselves have agreed to and have written in their contract, and enforces it according to its legal effect, and when an insurance agent's authority is limited, and the party with whom he contracts has notice of such limitation, under no circumstances can the principal be bound beyond the agent's authority.

INSURANCE — POWER OF AGENT — ESTOPPEL AGAINST INSURED. — Where a policy of insurance itself contains an express limitation upon the power of the agent, he has no right to contract, as against the company, with the party to whom the policy has been issued, so as to change its terms, or to dispense with the performance of any part of the consideration, either by parol or in writing, and the insured is estopped by accepting the policy from setting up powers in the agent at the time in in opposition to the conditions and limitations in the policy.

INSURANCE — POWER OF AGENTS. — Insurance agents at a distance from their principals are either general or special agents possessing either plenary or limited powers, depending upon the terms of the grant of power, exercised with the assent of the principals, and the extent of their authority is to be determined by the same rules that control in respect to other agencies. If the assured has knowledge of the limited powers of such agent, he is estopped from claiming that such limitation does not exist, or in hostility to it.

INSURANCE — POWER OF SPECIAL AGENT — INSURED MUST TAKE NOTICE OF. — An insurance company may limit the power of its agent, and when such notice as a prudent man is bound to regard is brought home

to the assured, limiting the power of such agent, he relies upon any act in excess of such limited power at his peril. In the case of a special agent, the assured must, at his peril, know whether the act relied upon is within the scope of his real or of his apparent authority.

INSURANCE — EVIDENCE OF RESIDENCE. — Where the assured owns two houses, only one of which is insured, and there is sufficient furniture in either for the purposes of a residence, evidence as to whether or not the insured building contained less furniture at the time of the loss than was in the uninsured house is too remote to be admissible to establish the fact of residence or occupancy.

INSURANCE — PROOF OF LOSS. — Where a policy of insurance makes certain proofs to be furnished by the assured in case of loss conditions to be complied with by him before he has any claim against the company, he must comply with such conditions substantially, if not strictly, before he can recover. Failure to make such proof may, however, be waived by the company.

INSURANCE. — To CONSTITUTE WAIVER which will prevent the insurer from relying on the terms of the policy, there must be some act which amounts to an estoppel. The company must either itself, or by some act of its agent having real or apparent authority, do or say something that induces the assured to do or forbear to do something whereby he is prejudiced.

INSURANCE — CONDITIONS — PROOF OF LOSS. — When failure to comply with conditions in a policy relating to proof of loss is due wholly to the fault of the insured, the policy is dead, and cannot be revived by anything short of a new consideration and an express waiver on the part of the insurer. If no proofs of loss are served in time, and the insurer has done nothing to induce the omission, the insured loses all rights under the policy, and the insurer is not bound to specify his defenses, nor does he waive those not specified.

INSURANCE — OCCUPANCY. — Where a policy of insurance on a dwelling-house contains a provision that the policy shall become suspended if the property becomes vacant or unoccupied, "occupied," within the meaning of the policy, means that the dwelling-house must be used by human beings as their place of abode. The fact that after such house became vacant the insured or his hired men or some member of his family visited the house every day to see that things were all right is not an occupancy within the meaning of such policy.

ACTION on a policy of insurance to recover for the loss of a dwelling-house and household goods therein. The policy sued on contained the following, among other conditions: "This company shall not be liable for any loss or damage while the above-mentioned premises shall be vacant or unoccupied, or resulting from the neglect of the assured to use all possible effort to keep the property safely protected against fires that may originate or start on the premises," etc. And this: "In case said property or any part thereof shall be sold, conveyed, or encumbered, or if any change shall take place in the title, possession, or occupancy, . . . without being immediately

notified to this company, and its consent thereto obtained in writing and indorsed hereon, and signed by the president or secretary of this company, this policy shall in either event, immediately thereafter, be null and void. The opinion states the remaining facts.

W. H. Wilson, for the appellant.

W. E. Crews, for the respondent.

STRAHAN, J. The following are the assignments of error made by the appellant, and which have been argued in this court:—

1. Error of the court in permitting the plaintiff to give evidence of an oral agreement between him and one Reeder, a solicitor of the defendant company, to the effect that the plaintiff might leave the insured premises unoccupied.

2. Error of the court in refusing to allow counsel for the defendant to ask the plaintiff, while a witness on his own behalf, how much more furniture the plaintiff had at what was known as his middle ranch than at the place that was burned.

3. Error of the court in charging the jury as follows: "The court charges you that if you find from the evidence that the plaintiff made a statement, in writing, to the company, although such statement was not verified, if the company acted upon it, and sent an adjuster to settle or adjust the loss, then the company will be deemed to have waived that condition in the policy."

4. Error of the court in overruling defendant's motion for a nonsuit.

These assignments, so far as may be necessary to the proper disposition of the case, will be considered in their order.

1. The first assignment of error is based on what occurred at the trial in the examination of the plaintiff as a witness in his own behalf. He testified, without objection, that in March, 1888, one L. B. Reeder came to him and asked him to have his property insured, and said that he had been there twice before to see him on the same business. Counsel for the defendant here asked and obtained leave of the court to inquire of said witness whether he had made a written application for insurance, and he answered that he had; and said application being shown to the witness, he further testified that he had signed it at the time, but that he did not read it or hear it read except as Mr. Reeder read it to him; that he was a German, and did not speak, read, nor write the English language

very well, but that he could read some, and there were always some difficult words that he did not know the meaning of. The application was then offered in evidence, and was received without objection, and the bill of exceptions recites that it contained the provisions set forth in the defendant's answer, in the same words as in said answer set forth. It also contained a particular description of the premises insured, and stated that the same was occupied by the insured as a private dwelling, and the following statements were indorsed thereon: "A part of Mr. Weidert's family lives in this house, and the other part lives in his other house," and on the back thereof was signed the name, "L. B. Reeder, solicitor." The witness then testified, under an objection and exception by the defendant, that at the time he made his application for insurance, he asked Reeder particular questions, e. g.: "How is this," I said; "when I move away, and have part of my family here and a part with me, as I will have to do?" He said: "As long as your furniture remains here and the house is occupied, all right." I said: "I will be away plowing before long now, and cannot stay on this place all the time." And he said: "It does not make any difference; you can move." I then said: "If this is the case, if I don't have to stay right steady, I will get insured." Whether this evidence is competent is the question submitted for our determination.

One objection made to this character of evidence by the appellant is, that Reeder had no authority to make any contract or agreement whatever with the assured, and that his want of authority to make agreements concerning the occupancy of the premises insured outside of or different from the terms of the application and policy was plainly printed in the application, which the plaintiff signed, and that he was bound to take notice of his want of authority. It must also be observed, in this connection, that the plaintiff says that Mr. Reeder read over the application to him at the time he signed it, and it is not pretended that he read it incorrectly; and while the plaintiff testified that he is a German, and does not understand English very well, he nowhere claims that he did not understand every word of that application. In the light of these facts, how can it be claimed that Reeder could make any other or different contract with the assured than to take his written application according to the rules of the company and forward it to the home office, and if it was there approved, a policy to be based on said application, and not on something

the solicitor may have said to the assured, would be then issued? When it expressly appears that this solicitor's powers were so limited, and that the plaintiff knew it, how can it be claimed that the defendant was bound by his unauthorized act? Contracts of insurance must have effect like all other written contracts. The intention of the parties must govern and control, and when the language is plain and unambiguous, such intention must be gathered from such language. In such case the court simply ascertains the language the parties themselves have agreed to and written down in their contract, and enforces it according to its legal effect. When an agent's authority is limited, and the party with whom he contracts has notice of such limitation or want of authority in the agent, under no circumstances can the principal be bound beyond the agent's authority. This principle has been applied to contracts of insurance. In *Catoir v. American Life Ins. and Trust Co.*, 33 N. J. L. 487, it was held that when a policy itself contained an express limitation upon the power of agents, an agent had no legal right to contract as against the company with the party to whom the policy had been issued so as to change the terms of the policy, or to dispense with the performance of any part of the consideration, either by parol or in writing; and such party is estopped by accepting the policy from setting up powers in the agent at the time in opposition to the conditions and limitations in the policy. So in *Armstrong v. State Ins. Co.*, 61 Iowa, 212, it was held that an agent of a fire insurance company who had authority to take applications for insurance and receive and receipt for premiums, and forward applications and premiums, and receive from the company policies of insurance when issued and deliver them to the assured, and who had no other or further powers, real or apparent, could not bind the company by a contract of insurance. So in *Critchett v. American Ins. Co.*, 53 Iowa, 404, 36 Am. Rep. 230, where a note was given in payment of a premium upon an insurance policy, which provided that if default was made in the payment of any installment of premium upon any premium note for thirty days after due, the company should not be liable for any loss happening after that time, and before payment. It was claimed that an agent who had authority to receive applications for insurance and collect and transmit premiums had extended the time of payment, but it was held that such extension, even if shown, was not binding on the company, and they were not liable for loss

occurring during the period of such pretended extension. *Merserau v. Phoenix Mutual Life Ins. Co.*, 66 N. Y. 274, is a very important case involving the principle under consideration. In that case the limitation of the agent's powers was indorsed on the policy, and he possessed powers similar to those conferred by the defendant company in this case. The agent called upon the assured, who was ready to pay the premium, but the requisite receipts had not been forwarded from the home office to enable the agent to receive the premium, and therefore the agent said to the assured, "Give yourself no trouble about it; I will see that you are kept all right with the company." A loss occurred, and the company set up the non-payment of the premium as a defense, and the plaintiff relied upon a waiver by the company through its agent, but the defense was sustained. Allen, J., delivering the opinion of the court, said: "Agents of underwriters at a distance from their principals are either general or special agents possessing plenary or limited powers, depending upon the terms of the grant of power or powers, exercised with the assent of the principals; and the extent of their authority is to be determined by the same rules that control in respect to other agencies." And it was further held that the assured had knowledge of the limited powers of such agent, and he was estopped from claiming that said limitation did not exist or in hostility to it.

And in *Wood on Fire Insurance*, section 411, the doctrine is stated as an elementary principle. It is said: "So where direct notice, or any notice which the assured as a prudent man is bound to regard, is brought home to the assured, limiting the powers of the agent, he relies upon any act in excess of such limited authority at his peril. That an insurance company has a right, in a fair way, to limit the powers of its agents must be conceded, and when it does impose such limitations upon his authority in a way that no prudent man ought to be mistaken in reference thereto, it is not bound by an act done by its agent in contravention of such notice." And *Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408, *Pottsville Mutual Fire Ins. Co. v. Fromm*, 100 Pa. St. 347, *Residence Fire Ins. Co. v. Hannawold*, 37 Mich. 103, *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516, *Dickinson Co. v. Mississippi Val. Ins. Co.*, 41 Iowa, 286, *Security Ins. Co. v. Fay*, 22 Mich. 466, *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402, *Alexander v. Germania Ins. Co.*, 66 N. Y. 464, 23 Am. Rep. 76, *Galbraith v. Arlington etc. Ins. Co.*,

12 Bush, 29, are to the same effect. The law of agency is to be applied here, and it is not different in its application to insurance from what it is in any other case to which it is applicable. 2 Wood on Fire Insurance, section 421, no doubt states the true rule. The author says: "But in all cases the distinction between the powers of general and special agents should be kept in view, and in the case of a special agent the assured must at his peril know whether the act relied on is within the scope of his real or of his apparent authority. He is bound to know when he has passed the precise limits of his power, and cannot rely upon the assumption of authority by the agent to do an act beyond the scope of actual authority, real or apparent. The declarations of an agent are not evidence of his authority, but the scope and extent of his powers must be determined by his actual authority or by his acts, and the recognition thereof by his principal." Counsel for respondent cites *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 133; but in that case the agent did not assume to make a different contract from what was contained in the application and policy, nor does it appear what was the scope or extent of his authority or apparent authority. He also cites *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297, but that case relates to the question of waiver by the company, and does not touch the question under consideration. *Menk v. Home Mut. Ins. Co.*, 76 Cal. 50, 9 Am. St. Rep. 158, is also cited. In that case, under an issue of misrepresentation, it was held competent in an action on a fire insurance policy to give evidence that the application was made out by an agent of the insurance company with full knowledge of the condition of the premises, and that the plaintiff did not know what representation it contained. Whether the agent was general or special does not appear, and express averments were made as to the misrepresentation. *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 7 Am. St. Rep. 557, is also cited by respondent, but that case does not hold that the acts of a special agent with limited powers known to the assured would bind the company. It holds that if, after hearing a full and truthful statement of the condition of the property insured from the owner, an agent of the insurance company fills the blanks in a printed form of application furnished him by the company with misrepresentations and false statements, and the insured signs the same without knowing its contents, and without other fault than that he relied upon the agent to write down his statements correctly, and pays the

premium, obtains a policy, and sustains a loss, that the company was estopped from denying its liability under the policy. In this case the pleadings present no issue as to misrepresentation, nor under the facts disclosed would the questions involved be materially affected if they did. *Kruger v. Western F. & M. Ins. Co.*, 72 Cal. 91, 1 Am. St. Rep. 42, is also relied upon, but the court in that case found expressly that the agent was a general agent of the company, and that he had the power to waive the conditions of the policy. *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121, is also cited by the respondent; but in that case the agency was general, and not special, and the learned editor has appended a note, in which it is stated that an insurance company has power to restrict the powers and duties of its agents as it may choose; and when their authority is expressly limited and restricted by the policy which the assured receives, such restrictions and limitations must be regarded as binding upon him; citing *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908, and note 913.

But, in addition to what has been said, it is not perceived when fraud or mistake or other imperfection in the writing is not put in issue by the pleadings, on what ground this evidence could be admitted. The statements relied upon were contemporaneous with the writing. In such case they are merged in the writing, and cannot be proven, unless under particular circumstances, which do not appear here. This is the common law, and was deemed so important by the legislature that it is enacted as a part of the statute law of this state: Hill's Code, sec. 692.

2. The next error complained of is the refusal of the court to allow plaintiff to testify on his cross-examination by defendant's counsel as to how much more furniture he had at what was known as his middle ranch than at the place that was burned. This ruling was not error. The facts sought to be elicited are supposed to have some bearing upon the question of the occupancy of the building insured, but we think otherwise. They were too remote. We think the facts elicited show that the plaintiff had all the necessary furniture to answer his purposes at both places, and whether he had a little more or a little less at one place or the other had no bearing upon the question of occupancy.

3. The next error relied upon by the appellant is the giving of the following instruction to the jury by the court: "The

court charges you that if you find from the evidence that the plaintiff made a statement in writing to the company, although such statement was not verified, if the company acted upon it, and sent an adjuster to settle or adjust the loss, then the company will be deemed to have waived that condition in the policy."

The pleadings present no issue whatever on the subject of waiver by the company of this or any condition in the policy. The plaintiff alleges that he duly performed all the conditions of said contract on his part to be performed. This he might do under section 87, Hill's Code, but the same section also provides that if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. On the trial in this case the plaintiff made no attempt to establish the facts showing performance, but what he undertook to prove was, that the defendant had waived the performance of a particular condition of the policy, and it was on that subject — an issue vital to the plaintiff's case, and not in the pleadings — that the court instructed the jury. On this branch of the plaintiff's case the court by this instruction made it possible for the plaintiff to recover on a question of fact nowhere alleged in the pleadings: *Warren v. Bean*, 6 Wis. 120. But this question was not made in the argument, and we will not place our decision upon it. We only refer to it to indicate what we conceive to be the correct method of pleading in such cases, and to avoid misconception.

There is no doubt that the policy declared on by the plaintiff makes certain proofs to be furnished by the assured in case of loss conditions to be complied with by him before he has any legal claim against the company for loss, and in such case all the conditions must be substantially, if not strictly, complied with, or no recovery can be had: 2 Wood on Fire Insurance, sec. 436, and authorities there cited. It is equally as well settled that the failure to make such proof may be waived by the company: 2 Wood on Fire Insurance, sec. 439, where the authorities are carefully collated.

One of the conditions of the plaintiff's policy in case of loss or damage was, that he was to perform certain things in respect to the damaged property, and then give immediate notice and render a particular account thereof in writing to the company, stating the time, origin, and circumstances of the fire, the occupancy of the building insured or containing the prop-

erty insured at the time of the loss; the whole value of the ownership of the property insured, and all encumbrances thereon; the amount of the loss upon each article; other insurance, if any, giving a copy of all policies, — all of which shall be verified by the affidavit of the assured and claimant. And here is what the plaintiff says he did after the fire, as recited in the bill of exceptions: That at the time the fire occurred, which was the night between the 9th and 10th of July, he was at the mountains to get two loads of wood, to make his home there; that after the house was burned, two or three days after, he went to Mr. Reeder to notify him. Mr. Reeder was not there, but his brother was. The second time he went to see Mr. Reeder he was there, and he showed witness a letter he had received from the company, and he read it to him. When he went to Reeder he said he would write a statement for witness; that witness wrote to the company himself, and received a letter from them; that after this Reeder came out to the place, and also Mr. Beeler, but that he was in Walla Walla at that time; that he offered to make a statement to Mr. Reeder in reference to this matter. On his cross-examination the witness said that he did not know whether he wrote the letter to the company right away after the fire, or not; that he could not state the date; that he did not know whether he wrote once or twice; that he wrote as soon as Mr. Reeder told him to do so; that he told Mr. Reeder that he could not write very good, but Reeder told him to do as good as he could, and so he wrote. After being recalled, the plaintiff testified that he received a letter from defendant, which he delivered to Mr. Tustin. Mr. Tustin was then called, and testified that the plaintiff delivered a letter to him with the policy; but after making diligent search in his office, and at all places where he kept such papers, he was unable to find the same. The witness was then asked to state the contents of said letter, and without giving date, he said that as near as he could remember it read: —

“MR. JOHN WEIDERT.

“*Dear Sir,* — We have received your letter from Mr. Reeder as to your loss by fire, and we will send an agent as quickly as possible to value the damage.”

They said Mr. Reeder was agent. It does not appear that this paper was signed by any person. The witness further testified that Beeler was named in that letter; that he had gone to Mr. Reeder and told him to write, and afterwards

Reeder told him he had written. Mr. Paul testified that Mr. Beeler came to the place with Mr. Reeder, and that the plaintiff was away from home; that they staid about half an hour and said they wanted to see the plaintiff very bad; after dinner they went down toward the house that was burned. Beeler told the witness that he wanted to see Mr. Weidert; that he wanted to settle it up; that the plaintiff was expected home from Walla Walla that evening, and they said they wished they could stay, but they had to be in Portland that evening and could not wait; he just said he wanted to settle up from that fire. The witness, on his cross-examination, said that Beeler told him that he wanted to see the plaintiff about the fire and settle up; that he did not say anything about the money, but only said that he wanted to see about the fire and how it was, and that he wanted to settle up; that he went down to the house that was burned, then he asked where the road was, and that was all he said. Mrs. Weidert testified substantially to the same facts as to Reeder's and Beeler's visit. The defendant, having proven the plaintiff's signature to the following letter, offered the same in evidence: —

“November 2, 1888.

“TO THE STATE INSURANCE COMPANY.

“*Dear Sirs,*—I just met with Mr. Reeder on the 29th of October. We have missed one another before. Even when Mr. Reeder was at my place, I was to Walla Walla; that is twenty-six miles from my place. I did not know that he was coming that day, or else I would have stayed at home. Mr. Reeder wanted me to state something to you about my business.

“About this place where this house has been burned: This house I bought for my special home, on account of there being a good house and good water on it. I could have insured it for three hundred dollars more than I insured it for, but I did not want to. Where I lived before I had to haul water. I could not move in that house when I bought it. It was rented till the 1st of March. This family moved out, and I moved in this house till I was done plowing. I have got ranches two and three miles apart. Then I moved on to the next place and camped there, to plow there. This time the man who had the house before came to me and said: ‘Mr. Weidert, can I rent this house from you till the 1st of July?’ I said: ‘No; I think I will get done here by the 1st of June, and then I want to move back again; but if you don’t disturb

the furniture, you can move into it till the 1st of June, and then I want to move back.' Accordingly he says: 'All right; it accommodates me very much.'

"I had another place, two miles farther north, which I had hired to plow; but the last week in May, this man sent me word that he could not plow the ground for me, so I had to finish this place, and go there and plow that myself. I had to camp on the bunch-grass and cook on a camp fire.

"The 1st of June came, and this man came to me and said: 'Mr. Weidert, I cannot move by the 1st of June, and I would like to get ten or twelve days longer.' I says: 'All right, Mr. McNett; I don't think I can get back as soon as I calculated, on account of this plowing.' So he moved on the 12th of June. I did not get done plowing on that place till the 20th of June. Then we went to Walla Walla and visited our friends and picked berries, and canned them at the same time, because they don't haul well that far. By that time the Fourth of July came on, and we stayed over the Fourth, and we came back the 7th of July, when we finished plowing.

"Then we went to the mountains to haul a couple of loads of wood back home. It got a little late when we came back from the mountains, so we left our wagons standing where we stopped, to take them home the next day. And that day our turn came to have our hay cut, and I had to go and show where to cut it. I told the hired man to fetch our dinner, and help cut some hay when he came. He drove by there with a hack to bring something. When he came up to us he said: 'We are moved now; the house is burned down,' and I and the man cutting hay for me dropped everything and walked there, and we found it burned down. So we had to move down where we were cutting hay at that time, where there was an old shanty standing.

"I had to move my family in town this winter, to stay till next spring. This shanty is too cold. I was waiting on this new railroad to bring some dry lumber up here. They don't bring dry lumber this fall, and will not till next spring, so I can't build till next summer. We have got to haul the lumber with wagons too far here.

"The 8th of July (that was Sunday) we were in the house to straighten things up in the house, so that we would not be bothered when we came from the mountains. We were there pretty near every Sunday to look after our things, and make our home there.

"Gentlemen, that is as near as I can state it to you. I asked Mr. Reeder if it would make any difference if I was out to my other places at work, and he said, 'No, sir.' We have never left the house more than a week without going back and taking care of things there. Please write me an answer on this statement as soon as possible.

"Yours truly,

JOHN WEIDERT.

"VANSYCLE, Umatilla County, Oregon."

On the question of waiver the policy declared on contains this statement: "It is expressly agreed that if any person or persons on behalf of the company shall aid or attempt to aid the claimant in making proofs of loss, so called, or examining the claimant, or otherwise investigating such claim, that in either of such events, no conversation, promise, agreement, or understanding of such person with such claimant or any one else on his or their behalf, or notice given to or knowledge obtained by such person or persons, shall be in any manner binding on the company, or regarded as a waiver or estoppel of any condition of this policy or the law applicable thereto; and that no person has any authority or power to make any promise or agreement to pay any loss or claim under this policy, or to waive any conditions of this policy or the law applicable thereto, except the president or secretary of this company, and then only when the same and all the detailed terms and conditions thereof are reduced to writing and duly signed by said president or secretary."

The instruction under consideration wholly ignores the element of time within which proof of loss should be made. By the terms of the policy it was to be immediately after the loss, which I have no doubt required diligence on the part of the assured. But the time could doubtless be waived as well as any other condition of the policy, and the question therefore is, whether or not there was any evidence of waiver which authorized the court to submit that question to the jury. Just when the plaintiff wrote to the defendant does not appear, nor does the evidence anywhere disclose the nature or contents of the letter he says he wrote some time after the fire. It might be inferred from the contents of the letter which he says he received from the company that it said something about the plaintiff's loss, but that letter was not signed by any person, and it does not appear whether it really came from the company or not. More than that, the letter which the defendant received from the plaintiff of November 2d,

and which it conceded that he wrote, tends very strongly to show that the plaintiff did nothing after the fire by way of submitting proof of loss until he wrote this letter. The first paragraph of that letter admits of no other reasonable interpretation. But taking all the oral evidence together with the letter, does it tend in any manner to prove a waiver? A waiver in this sense is in the nature of an estoppel. The company must, by some act of an agent having real or apparent authority, have done or said something that induced the plaintiff to do or forbear to do something whereby he was prejudiced. It does not appear from this evidence that the company did anything of that kind in this case, nor does it appear that it acted upon any statement in writing made by the plaintiff, or that it sent an adjuster to settle or adjust the loss. What relation Mr. Beeler sustained to the company does not appear. He may have been an authorized adjuster of the company, but if he was, the fact does not appear from this record, and until such fact be shown, it is not perceived on what ground the company could be bound by his acts. But conceding that the record shows that he was such adjuster, the fact that he went to the place of the fire some time after it occurred, and inquired for the plaintiff, and said and did all the other things which the evidence tends to prove, there is not enough shown to constitute a waiver. Section 439 of 2 Wood on Fire Insurance sums up the result of the cases by saying: "But, generally, it will be found that the delay has been induced by such acts and conduct on the part of the insurer or his agents as amounts to an estoppel rather than a waiver, and the general doctrine seems to be, and that more consistent with principle, that when the failure to comply with the condition is due wholly to the fault of the insured, the policy is dead, and cannot be revived by anything short of a new consideration and an express waiver on the part of the insurer. And in the same section the learned author cites *Brink v. Hanover Fire Ins. Co.*, 70 N. Y. 593, decided by the court of appeals of the state of New York, in which case the court said: 'If no proofs are served in time, and the insurer has done nothing to induce the omission, the insured has lost all rights under the policy, and the insurer is not bound to specify its defenses, nor does it waive those not specified.'"

4. But however this may be, there is another view of this subject that is decisive against the plaintiff on this question. An insurance contract, like every other contract, in the absence

of fraud, illegality, or mistake, must be so construed that every part of it shall have effect according to its terms. The intention of the parties must be gathered from the contract; if that be uncertain, the circumstances, surroundings, situation of the subject-matter, and other rules of construction, may be resorted to for the purpose of aiding the court in determining the meaning of the contract, and the intention of the parties in making it. But when the import of the language of the contract is so plain as to leave no doubt whatever as to what the parties intended, the court has no discretion but to enforce it. Section 694, Hill's Code, states the rule, which is only declaratory of one of the first principles in the laws applicable to the construction of contracts: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all." A party cannot protect himself from the consequences of his own fraud by contract, but in the absence of something of that kind, I fail to see any reason why the terms of the policy as to waiver should not be given full effect. This the trial court did not give or allow by the instruction under consideration, and the same was therefore erroneous.

5. At the conclusion of the plaintiff's evidence, the defendant moved for a nonsuit, because the plaintiff had failed to prove a case sufficient to be submitted to a jury, which was overruled, and this is assigned for error. All the evidence is in the transcript, but the great length of this opinion will only allow a very brief examination of this question. The plaintiff encountered the same difficulty here that he did in another part of his case. He alleged due performance of the agreement on his part, and then sought to prove a contemporaneous parol agreement as to the occupancy of the premises, which we have already indicated was objectionable; but on the argument here the plaintiff's counsel insists that his evidence tended to prove an occupancy of said premises from the date of the policy to the fire. To test the correctness of this claim, I have carefully read all the evidence, and think it fails to show such occupancy. The plaintiff testifies that he moved away from the place on about the 20th of March or the 1st of April, he did not remember which, and that McNett moved in the next

day or day after that, he did not remember which; that McNett lived there until the 15th or 20th of June, and that after McNett moved away from the house, he, or his hired man, or some member of the family, was there at the house every day to see if things were all right. He further says he was at the house after the 20th of June, frequently, until the house burned; that the big members of his family were there often; that he was not there when it burned, and did not know how the fire occurred. On recross-examination, the witness said he did not know whether Mr. McNett was at the house after the 12th of June or not. He further said that some of the family were at the house every day; that they just went down there to see that nothing was destroyed. The fire occurred on the night after the 9th of July. Paul was also a witness, but his evidence adds nothing to what the plaintiff said. Conceding to the fullest extent all the facts that this evidence tends to prove, is any occupancy of said premises shown after McNett moved out? The appellant did not make the question as to whether McNett's moving into the house was a change in the tenancy within the meaning of the policy or not, and so we confine our inquiry simply to the question of occupancy after McNett moved out.

In *Keith v. Quincy Mut. Fire Ins. Co.*, 10 Allen, 228, an instruction to the effect that it is not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around to see if things were right, but some practical use must have been made of the building, and that if it thus remained without any practical use for the space of thirty days, it was, within the meaning of the policy, an unoccupied building for that time, and the policy became void, was approved by the supreme court of that state. So in *Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422, 17 Am. Rep. 117, it was held that a dwelling-house and barn are unoccupied within the meaning of an insurance policy which provides that buildings unoccupied shall not be covered by the policy when the house is only used by the insured and his servants for the purpose of taking their meals there when engaged in carrying on a contiguous farm, and the barn is only used for the purpose of storing hay and farming tools. So, also, in *Corrigan v. Connecticut Fire Ins. Co.*, 122 Mass. 298, it was held, in an action on a policy which provided that if the house should "remain vacant or unoccupied for the space of ten days without

written notice to and consent of the company," it was not erroneous to instruct the jury that if the house had not been used as a dwelling-place by some one within ten days of the loss, the policy would be void; and that if the former occupant had moved with his family into another house, where they slept and took their meals, the fact that some of the furniture remained in the house, and the key had not been surrendered to the landlord, until within the ten days, does not constitute an occupancy of the premises. And in *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, it was held that a dwelling-house was unoccupied when no one lives therein, but that it was not necessarily vacant. And in *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 162, it was held that for a dwelling-house to be occupied within the meaning of a policy which contained a condition declaring it void in case the premises "became vacant or unoccupied, and so remained for more than thirty days, without notice and consent of this company in writing," it must be used by human beings as their customary place of abode. *Cook v. Continental Ins. Co.*, 70 Mo. 610, 35 Am. Rep. 438, was also an action on a policy which was to become void if the premises should be unoccupied. The insured left the house and went elsewhere to reside, taking only part of her furniture. She left a man in possession, with instructions to sleep in the house at night. This man quit the premises, and several days afterward a fire occurred, no one being in the house at the time. Held, that the house was unoccupied, and that the policy was void. Other authorities hold the same doctrine: *Ætna Ins. Co. v. Meyers*, 63 Ind. 238; *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457; *Fitzgerald v. Conn. Fire Ins. Co.*, 64 Wis. 463.

Under the facts disclosed at the trial and in the light of the authorities cited, I think the conclusion irresistible that the building in question was not occupied at the time of the fire. In such case, the policy, by its terms, stood suspended. For the reason that proof of loss was not made as required by the policy, and because the facts show that the building was not occupied at the time of the fire, the circuit court erred in refusing the defendant's motion for a nonsuit. The judgment will therefore be reversed, and the cause remanded, with directions to allow the defendant's motion for a nonsuit.

INSURANCE — CONSTRUCTION OF THE POLICY. — An insurance contract is an agreement by which one party, for a consideration, agrees to pay money upon the destruction or injury of something in which the other party has an interest: *Rensenhouse v. Seeley*, 72 Mich. 604; *Quarles v. Clayton*, 87 Tenn.

308; *List v. Commonwealth*, 118 Pa. St. 322. Such contracts must be construed by the same rules which govern in the construction of other contracts; *Watertown F. Ins. Co. v. Cherry*, 84 Va. 72; all ambiguities being resolved in favor of the assured, and against the insurer: *Rogers v. Insurance Co.*, 121 Ind. 571; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 286; *Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000; *Kratzenstein v. Western Assur. Co.*, 116 N. Y. 54; *Hoffman v. Insurance Companies*, 88 Tenn. 735; *Insurance Co. v. Ayers*, 88 Tenn. 728; *Pettit v. State Ins. Co.*, 41 Minn. 299; *Philadelphia Tool Co. v. British Amer. Assur. Co.*, 132 Pa. St. 236; 19 Am. St. Rep. 596, and note. Parol evidence is inadmissible to contradict the provisions of a policy of insurance: *Robinson v. Insurance Co.*, 51 Ark. 441; *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317.

INSURANCE. — An assured must be held to have knowledge of the condition of his contract of insurance: *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414; 15 Am. St. Rep. 275. When an insurance policy contains limitations upon the powers of the agent, he has no legal right to contract as agent of the company with the assured so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, and the holder of the policy is estopped by its acceptance from relying upon any powers of the agent in opposition to the limitations and restrictions contained in the policy: *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908, and note. But a clause in an insurance policy that the company will not be bound by the act of any agent, etc., will not limit the company's power in the future to act through an agent: *Niagara Ins. Co. v. Lee*, 73 Tex. 641. The assured is not bound by any particular usage or rule of the insurer in respect to certain kinds of risks, where no notice thereof has been given to him: *Pettit v. State Ins. Co.*, 41 Minn. 300. See also *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15; 19 Am. St. Rep. 118, and note.

INSURANCE — PROOFS OF LOSS. — Under a policy whose provisions require notice and proof of loss to be given by the assured, satisfactory evidence of a compliance with such provisions is an essential prerequisite to recovery, unless such compliance has been waived by the company: *Central City Ins. Co. v. Oates*, 86 Ala. 558; 11 Am. St. Rep. 67, and note. Compare *Gould v. Dwelling-house Ins. Co.*, 134 Pa. St. 570; 19 Am. St. Rep. 717, and note.

INSURANCE — "VACANT AND UNOCCUPIED." — For the signification of the words "vacant and unoccupied" as used in policies of fire insurance, see *Continental Ins. Co. v. Kyle*, 124 Ind. 132; 19 Am. St. Rep. 77, and note. A policy becomes void when the risk is materially increased by non-occupancy without consent of the insurer: *Lancy v. Home Ins. Co.*, 82 Me. 492. "Occupancy" implies the actual use of the house as a dwelling-house: *Bonenfant v. Insurance Co.*, 76 Mich. 654. The intent of the parties to an insurance policy in respect to occupancy must be ascertained from the usual and ordinary use of the premises for the purposes to which they are devoted: *Fritz v. Home Ins. Co.*, 78 Mich. 565; *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 166. The company may waive such conditions, however, by granting permission to vacate the insured premises for a specified length of time: *Newmarket Sav. Bank v. Royal Ins. Co.*, 150 Mass. 375.

BEEKMAN v. HAMLIN.

[19 OREGON, 383.]

JUDGMENTS — PRESUMPTION OF PAYMENT FROM LAPSE OF TIME. — A judgment upon which execution has not issued, and which there has been no attempt made to enforce for twenty years, is presumed to have been paid, and such presumption can be rebutted only by some positive act of unequivocal recognition, like part payment, or a written admission, or at least a clear and well-defined promise or admission, intelligently made, within the period of twenty years.

Francis Fitch, for the appellant.

P. P. Prim, H. K. Hanna, and C. W. Kahler, for the respondents.

STRAHAN, J. The judgment sought to be revived in this case was rendered on the fifth day of February, 1861, and the record does not show that any execution was ever issued thereon. This proceeding was commenced on the nineteenth day of March, 1889, so that more than twenty-eight years intervened between the date of the entry of judgment and this attempt to enforce it. The only question I have thought it necessary to consider is, What effect has the lapse of time upon the right to enforce this judgment, independent of the statute of limitations? in other words, What would be the rights of the parties in this case if no statute of limitations were in force in this state? And this presents the question, What effect has the lapse of time, in this state, upon the right of a party to have a judgment renewed by the statutory proceedings? Does the common-law presumption of payment after twenty years arise in such case? and what is its effect? Section 172, Wood on Limitations of Actions, says: "In all those states where sealed instruments, or 'specialties,' as they are technically called, are expressly brought within the statute, the statute begins to run from the time when a cause of action arises thereon, and the bar is complete at the expiration of the statutory period; while in those states in which this class of instruments are not provided for, the common-law presumption of payment attaches from the time when the cause of action arises, and becomes complete as a presumptive bar at the expiration of twenty years from that time; and the mere lapse of twenty years without any demand, of itself, raises a presumption of payment." And the same author says, in section 30 of the same work, that a judgment obtained in the United States court, or in the court of the state where the remedy is sought, is within

the provisions of the statute; that is, the statute in relation to specialties, — twenty years. The rule of presumption, when traced to its foundation, is said to be a rule of convenience and policy, — the result of the necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. After stating the inconveniences which necessarily result from a contrary rule, the court in the same case says: "In a word, the most solemn muniments are presumed to exist, in order to support a long possession; the most solemn of human obligations lose their binding efficacy and are presumed to be discharged after many years: *Foulk v. Brown*, 2 Watts, 216.

So in *Tilgman v. Fisher*, 9 Watts, 441, the court said: "Such a lapse of time, in the absence of repelling evidence, is sufficient in law, without more, to raise a presumption of payment that would be binding upon both court and jury, so as to entitle the defendant, under a plea of payment, to a verdict and judgment in his favor. But being merely a presumption of the defendant's having made payment, it may be rebutted by proof of intervening circumstances, such as a demand of payment, payment of part by the obligator, his admission that the debt is still due, or his inability to pay it in within the twenty years."

And in *Rhodes v. Turner*, 21 Ala. 210, the principle under consideration was directly applied to a judgment, the court saying: "If a final judgment had been rendered, according to the principles of the common law it would be presumed to have been paid after the expiration of twenty years; and if the parties allowed this period to elapse without taking any steps to compel a settlement, we think the presumption of payment arises, and the executor or administrator should be exempted from the necessity of hunting up evidence to prove accounts and vouchers which ordinarily enter into such settlements, and which, after such a lapse of time, it would perhaps in most cases be impossible for him to obtain."

So in *Simms v. Augsterry*, 4 Strob. Eq. 103, the court applied the same principle, after a very careful examination of

the subject. After adverting to the statute of limitations as one of the means of giving repose to stale subjects of litigation, the court remarked: "We have another system of rules, founded upon what is called the doctrine of legal presumptions, which prevail alike in courts of law and equity, and which are eminently subservient to the quieting of titles, and the prevention of litigation arising upon obscure and antiquated transactions. If these legal presumptions require a longer period than statutory bars to acquire force and effect, they are more general in their operation. They are highly conducive to the peace of society and the happiness of families, and relieve courts from the necessity of adjudicating rights so obscured by time and the accidents of life that the attainment of truth and justice is next to impossible. . . . These legal presumptions by which conflicting claims and titles are set at rest I have endeavored to show are natural and necessary. They spring spontaneously out of the institutions and relations of property. As to the precise time at which they arise, each independent community must judge for itself. We have adopted the law of the mother country. In South Carolina, as in England, by the lapse of twenty years without admission, specialties and judgments are presumed to be satisfied and trusts discharged." And *McArthur v. Carrie's Adm'r*, 32 Ala. 75, 70 Am. Dec. 529, is a very carefully considered case, and to the same effect. And this is followed by *Goodwyn v. Baldwin*, 59 Ala. 127. Many other authorities are to the same effect: *Ray v. Pearce*, 84 N. C. 485; *Olden v. Hubbard*, 34 N. J. Eq. 85; *Lyon v. Adde*, 63 Barb. 89. In this latter case the court states what we conceive to be the correct rule, thus: "In the case of an obligation which can be extinguished by an act *in pais*, — such as payment, — there is an absolute presumption of payment after twenty years. It is a presumption of law, and can be rebutted only by some positive act of unequivocal recognition, like part payment, or a written admission, or at least a clear and well-identified promise or admission, intelligently made, within the period of twenty years." And in *Olden v. Hubbard*, 34 N. J. Eq. 85, it was expressly averred in the bill that non-payment had been made on the mortgage which was sought to be foreclosed for more than twenty-three years, and that the principal and interest were then due and owing; and on demurrer to the bill it was held that while the demurrer admitted all material facts, these statements were not ad-

mitted, because they were rather conclusions than averments of facts; and it was further held that any existing facts which would repel the presumption of payment must be averred in the bill.

In *Cope v. Humphreys*, 14 Serg. & R. 15, it was held that after the lapse of twenty years a judgment is presumed to have been satisfied, unless there be circumstances to account for the delay. And in the opinion of the court in that case Peake on Evidence, 481, is cited, where it is stated that twenty years is presumption of payment of a bond, and the same rule applies to a *scire facias* for execution on a judgment. And *Miller v. Smith's Ex'r*, 16 Wend. 425, is to the same effect. It is not possible to cite all the cases bearing on this interesting subject, but the following may be added as additional illustrations of the principle involved: *State of Tennessee v. Virgin*, 36 Ga. 388; *Roe v. Doe ex dem.*, 47 Ga. 540; *Whitney v. French*, 25 Vt. 663; *Anderson v. Settle*, 37 Tenn. 202; *Diamond v. Tobias*, 12 Pa. St. 312; *Reynolds v. Green*, 10 Mich. 356; *Howland v. Shurtleff*, 2 Met. 26; 35 Am. Dec. 384; *Anderson v. Smith*, 3 Met. (Ky.) 491; *Cheever v. Perley*, 11 Allen, 584; *Inches v. Leonard*, 12 Mass. 379; *Summerville v. Holliday*, 1 Watts, 507; Freeman on Judgments, sec. 464; 1 Greenl. Ev. sec. 39.

2. The foregoing authorities hold with great uniformity that the lapse of twenty years creates a presumption of law that specialties, including judgments, have been paid, but this presumption is not, under all circumstances, absolutely conclusive. It may be disputed and overcome; in what manner this may be done, or what shall be sufficient to produce that result, the authorities are not agreed.

Some of the authorities hold that any evidence tending to prove non-payment may be sufficient; that the fact must be found by the jury, and that any evidence ordinarily competent on the question of payment, if it satisfies the jury, is all that the law requires. Another class of cases, and which we think have the better reason to support them, hold with *Lyon v. Adde*, 63 Barb. 89, that this presumption is one of law, and can be rebutted only by some positive act of unequivocal recognition, like part payment or a written admission, or at least a clear and well-identified verbal promise of admission, intelligently made within the period of twenty years. So in *Cheever v. Perley*, 11 Allen, 584, it was held if parol evidence was relied upon to control the presumption, it should

clearly show some positive act of unequivocal recognition of the debt within that time, that is, within twenty years. And in *Summerville v. Holliday*, 1 Watts, 507, it is said that it is not so much a presumption that the money has been paid or a right of way granted as it is the substitution of an artificial rule in the place of evidence or belief, after a delay which may have been destructive of the evidence on which a belief might be justly founded. So, also, in *Whitney v. French*, 25 Vt. 663, Chief Justice Redfield, in speaking of this presumption, said: "It is a presumption of law, and in itself conclusive, unless encountered by distinct proof. It is not to be submitted to the discretion of a jury, although adversely an inference of fact, where there is any conflicting evidence. And this presumption of the payment of a mortgage or release of an estate is often made against what is believed to be the very fact, for the purpose of quieting a long adverse possession, and to prevent virtual fraud, by the setting up of dormant title long since supposed to have become extinct."

3. The pleadings in this case are so framed that it was hardly possible to properly try the real questions upon which the rights of the parties depend. The defendant, instead of directly pleading in his answer that he had paid the judgment mentioned in the plaintiff's pleading, alleged evidentiary facts, which, if proven, would have tended very strongly to establish the fact of payment. This was bad pleading on the part of the defendant; but the objection, I think, ought to have been taken by motion, and not by demurrer. It related more to the form of the pleading than it did to the substance; but there is neither demurrer nor motion in the record, and we cannot know just what objections were urged against this pleading, nor in what form, further than is recited in the journal entry, that it was by demurrer. The defendant seems to have acted at the trial on the assumption that the facts alleged in his answer remained a part of the record, because he offered proof on the point originally alleged, but the same was objected to and excluded. The facts which the defendant offered to prove at the trial were, that for several years after the rendition of the judgment attempted to be revived the plaintiff and the defendant had large dealings together and many settlements and business transactions together. This was evidence to go to the jury, which they would have had the right to consider if the pleadings were in such a condition to render it admissible; but of this there is considerable un-

certainty. But I think the plaintiff's pleading is also insufficient, in that it fails to allege any facts or circumstances which would excuse the long delay or which tended to continue the defendant's liability after twenty years. This was expressly held to be necessary in *Olden v. Hubbard*, 34 N. J. Eq. 85. Several other questions were discussed by the appellant's counsel, but their consideration is deferred, for the reason the record is not in proper condition to present them.

The judgment will be reversed, and the cause remanded, and if, in view of the opinion of this court, either party shall deem it necessary to amend his pleading and retry the case in the court below, no doubt that court will afford either or both of the parties an opportunity to do so. We have purposely avoided saying anything in regard to the statute of limitations, for the reason that if that objection were available to the defendant, it was apparent on the face of the plaintiff's pleading, and should have been taken by demurrer.

Let the judgment be reversed.

PRESUMPTION OF PAYMENT FROM LAPSE OF TIME. — This subject is thoroughly and elaborately discussed in an extended note to *Alston v. Hawkins*, 18 Am. St. Rep. 879-888.

ANDERSON v. HAMMON.

[19 OREGON, 446.]

LANDLORD AND TENANT—CANCELLATION OF LEASE TO PREVENT WASTE.

— A court of equity will interfere on behalf of a landlord and prevent the decay and eventual ruin and destruction of his orchard, by canceling a lease and arresting the progress of waste resulting from the failure and omission of the tenant to perform his obligations under the lease.

SUIT in equity for a temporary injunction, to cancel a lease, and for damages. The court dismissed the suit for want of evidence to sustain the complaint. Plaintiff appealed.

H. K. Hanna and Francis Fitch, for the appellant.

C. W. Kahler, for the respondents.

LORD, J. The plaintiff in his complaint alleges that at the execution of the lease sought to be canceled he was the owner of a valuable apple orchard, consisting of thirty acres, and also twenty acres or more set with peach, plum, and apricot trees; that each was in a good and healthy condition when taken possession of by the defendants; that, induced by the

representations of the defendants they would cultivate, prune, and care for said said orchard if a lease could be obtained for the same, the plaintiff entered into a written lease with the defendants to have said orchards for the period of five years, in which they agreed to properly cultivate and prune the same according to the rules of good horticulture, plowing at least one way each year, etc., but that by reason of the neglect and failure of the defendants to properly cultivate said orchards, they were overrun with suckers, water-sprouts, and orchard pests, so that the trees were and are going rapidly into decay and ruin, to the irreparable injury of the plaintiff.

The answer admits the lease, etc., but denies specifically the neglect or failure to comply with the terms of the lease and all else material. The contention of the defendants is, that under the lease they were not required to do any particular amount of cultivation or pruning; that they only agreed to "prune and cultivate the orchards according to the rules of good horticulture"; and that the only indication of the amount of cultivation is limited to "plowing at least one way each year," and consequently were not bound to grub out the trees, to cut out borers, to take proper measures to destroy the woolly aphis, or other insect life detrimental to the healthful condition of the trees.

The evidence shows that the plaintiff and the defendant W. P. Hammon, previous to the execution of the lease, had several conversations in respect to the cultivation and preservation of fruit and the production of fruit thereon, and that the defendant professed, and so represented himself, to be versed by study and experience in horticulture; and that the plaintiff, impressed with the value of such knowledge and experience in fruit-raising, and the ability of the plaintiff to handle and care for his orchards so as to make them more profitable, and to improve and keep such orchards in good condition, and the trees in the best state of productiveness, was induced by the defendant to make the lease for the period named, which he represented to be necessary to effect such objects, keep the trees renovated and in good fruit-bearing condition, and reap the advantages suggested. It also shows that the defendant took the plaintiff into his orchard and explained to him wherein he failed, how the insect pests which often injured and destroyed the trees could be removed and exterminated, and how, according to good horticultural methods, the health of the trees could be maintained and their

fruit-bearing qualities preserved; that after several conversations of this character, the defendant himself drew up the lease, and it was signed in view of these facts and under such circumstances. The evidence shows that suckers growing around the roots of fruit-trees exhaust the nourishment that should go to the support of the trees; that water-sprouts growing after heavy pruning produce a similar effect; that the aphid infesting an orchard, when left to itself, eventually injures or kills the trees, and that the borer in a peach and apricot orchard, if not removed with a knife, produces a similar effect upon those trees. It is clear, then, to properly care for and cultivate an orchard, that it is necessary that one should look carefully after these matters, to prevent the decay or destruction of the trees and to preserve them in a healthy, fruit-bearing condition, for, it is conceded, unless suckers are removed, and these pests are checked or exterminated, the orchard will finally go into decay and be irreparably injured.

Whose duty, then, was it, under this lease, to attend to these matters? It would seem to me that the language of the lease necessarily included attention to these matters without their express mention. To prune and cultivate an orchard according to the best horticultural methods would require the doing of all those things which are essential to keep the trees in a good condition and preserve their fruit-bearing qualities, which would include the cutting off of suckers and water-sprouts when necessary to the health of the trees, as well as the taking of proper steps to remove insect pests, which sapped their lives, when the trees are so infested. But if there was any doubt as to the proper construction to be given to the lease, when what preceded and induced the making of the lease is considered, such doubt must be removed and the duty of the defendants in the premises made plain; they must have understood their obligation to include the removal and destruction of all such insect pests as were detrimental to the health of the trees. The lease was obtained and the possession of the orchard upon the reliance placed in the representations of the defendant W. P. Hammon; and under the circumstances the defendant must have known how the plaintiff understood it, and also that the defendant W. P. Hammon would give his personal attention to the cultivation of the orchards, according to the rules of good horticulture as understood and explained by him. That he did

not do so, but left the matter in other hands, and went to California, is not disputed. That by reason of the neglect and failure of the defendants to comply with their agreement, and properly cultivate and care for the orchards, we think the evidence shows that suckers and water-sprouts were allowed to grow and overrun the apple orchard, and that both orchards were infested with insect pests, which seriously injured the healthful condition of the trees, killing some and causing others to go into decay, and which, if permitted to continue without any effort at abatement during the period of the lease, must result in the ruin and destruction of these orchards and irreparable injury to the plaintiff.

Under such circumstances it seems to us a court of equity ought to interfere and prevent the decay and eventual ruin and destruction of these orchards by canceling the lease and arresting the progress of its waste from the failures and omissions of the defendants.

We think, therefore, the court erred in dismissing the suit, and that the cause must be remanded to take the account prayed for, with directions to cancel the lease, and make the injunction perpetual, and it is so ordered.

LANDLORD AND TENANT — WASTE. — A landlord may enjoin his tenant from using the leased premises in an improper manner, or in a way not in accordance with the terms of the lease: *Maddox v. White*, 4 Md. 72; 59 Am. Dec. 67, and note 70-72. Compare note to *Governor v. Withers*, 50 Am. Dec. 101-103. Where a tenant at will commits waste, it is a determination of the will, and an act for which trespass *quare clausum fregit* will lie by the reversioner: *Daniels v. Pond*, 21 Pick. 367; 32 Am. Dec. 269. A lessee must use the leased premises in a proper manner, and not expose them to ruin or waste: *Powell v. Dayton etc. R. R. Co.*, 16 Or. 33; 8 Am. St. Rep. 251. A contingent remainderman may obtain an injunction to restrain waste by a life tenant: *University v. Tucker*, 31 W. Va. 621. Taking clay from the soil by the life tenant to manufacture brick for the market is waste: *University v. Tucker*, 31 W. Va. 621. So cutting timber for sale constitutes waste on the part of the life tenant: *Dorsey v. Moore*, 100 N. C. 41.

FAULL v. COOKE.

[19 OREGON, 455.]

PUBLIC LANDS — RIPARIAN RIGHTS OF HOMESTEAD SETTLER THEREON. —

The riparian rights of a settler upon the public lands of the United States, with the intention of claiming the land under the homestead laws, attach from the date of his settlement, provided he complies with the law, and obtains a patent for the land. When such patent issues, it relates back to the settlement, and cuts off the right to divert any stream of water running through such homestead.

EXECUTION SALES — PROOF OF JUDGMENT ESSENTIAL. — An execution, regular upon its face, emanating from a court of competent jurisdiction, will protect an officer who obeys it; but when a purchaser claims title under an execution sale, he must prove the judgment upon which the execution issued.**EXECUTIONS — LEVY AND SALE AFTER EXPIRATION OF RETURN DAY. —** A sheriff cannot hold an execution until long after the expiration of the return day, and until his term of office has expired, and then make a valid levy and sale thereunder. Such an execution is *functus officio*, confers no authority whatever, and any attempted levy and sale by virtue of it are nullities.**HOMESTEAD IN PUBLIC LANDS — EXEMPTION OF LAND AND IRRIGATING DITCHES THEREON. —** A homestead in public lands, claimed and perfected under the United States statute, is exempt from liability for debts contracted prior to the issuing of the patent therefor; and necessary ditches, and the water in them flowing over such land, and used for irrigation purposes as part of the land itself, and not severable therefrom, are also exempt.**SHERIFF'S DEED, WHO IS PROPER OFFICER TO EXECUTE — ADVERSE POSSESSION. —** The sheriff in office at the time that the certificate of sale under execution is produced and the deed demanded is the proper officer to execute the deed. In such case, a claim of adverse possession cannot be based upon a deed executed by the officer who made the sale, and whose term of office had expired at the time of the execution of the deed, especially when such possession has not been open, notorious, exclusive, and continuous for the necessary period of time.

SUIT to enjoin defendant from disturbing plaintiff's use to certain water running in irrigation ditches, and quiet plaintiff's title thereto. Judgment for defendant, and plaintiff appealed.

C. H. Carey, for the appellant.

M. L. Olmsted and J. F. Watson, for the respondent.

STRAHAN, J. A proper disposition of this case requires that we should notice the sources of title set up by the respective claimants, and in doing so it will be most convenient to first examine the defendant's title. In the year 1869 the lands through which Connor Creek flows, and which are described

in the defendant's answer, were unsurveyed and unoccupied public lands of the United States. During that year one Christian Hinckler settled upon the same as a homestead, and after the said land had been surveyed, on the sixth day of March, 1883, he made his regular application therefor, alleging his settlement thereon in February or March, 1869. On this application a patent was duly issued by the United States to said Hinckler, dated the thirteenth day of March, 1885. After Hinckler had perfected his right to said land under the homestead laws of the United States, he died intestate in Baker County, Oregon, and John Geiser was duly appointed his administrator. Thereafter such proceedings were had in the county court of Baker County, Oregon, in the administration of said estate, that an order was duly made by said court, by virtue of which order the said real estate was sold by said administrator to the defendant, Cooke, for the sum of \$1,550. This sale was duly confirmed by said court, and on the fifth day of July, 1887, said administrator executed and delivered to the defendant, Cooke, a deed to said premises, together with all the water rights and privileges, ditches and ditch rights, and all and singular the improvements, tenements, hereditaments, and appurtenances.

The evidence tends to show that as early as 1872 Hinckler, commencing on his homestead, and near the line, cut a ditch extending nearly the entire length of his claim, by means of which he diverted the waters of Connor Creek for the purposes of irrigating his land for agricultural and horticultural purposes, and that this claim is bounded on one side for almost its entire length by Snake River, and that Connor Creek flows almost directly across the defendant's land and empties into said river on said premises, so that there are no riparian owners below the defendant on said creek. In 1874 Hinckler dug another ditch, by which he diverted a portion of the waters of Connor Creek, commencing a short distance above his land, by which means he conveyed the water to his land and for a long distance through the same, and then, again leaving his land, the water was conveyed to a placer-mining claim, where the same was used for some time for mining. After the mine was worked out, the water flowing in this ditch was also used by the said Hinckler for irrigating his land. Hinckler's ditches are numbered respectively 1 and 2. Ditch numbered 3 taps Connor Creek above No. 2, and conveys water to the land of Hill, mentioned in the pleadings. This is an old ditch.

but was dug after the ditches numbered 1 and 2, and was repaired and used by Hill some three or four years ago. The ditch marked No. 4 on the plat taps Connor Creek a long distance above No. 3, and is known as the Tarter and Huffman ditch, and was used for a while to convey water to a placer mine in Douglass Gulch. It was also constructed after Hinckler had settled upon his homestead and had diverted the water from Connor Creek in both ditches numbered 1 and 2. Whatever right, title, or interest Hinckler had in the land described at the time of his death passed to the defendant by virtue of the deed made by the administrator of Hinckler. It is therefore necessary to determine what rights Hinckler acquired in said land by virtue of his homestead settlement and subsequent compliance with the act of Congress granting homesteads to actual settlers upon the public lands of the United States, and the issuance to him of a patent therefor by the United States.

Under the third section of the act of Congress of March 14, 1880, chapter 89 (21 Stats. 141), it is provided that "any settler who has settled or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land-office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

In *Larsen v. Oregon R'y & N. Co.*, 19 Or. 240, it was held, in effect, that a settlement made by a homestead claimant upon the public lands of the United States and compliance with act of Congress on the subject segregated the same from the public lands and cut off intervening claims, and such is the ruling of the land department of the United States.

Since the announcement of the opinion in *Larsen v. Oregon R'y & N. Co.*, 19 Or. 240, this case was argued, and our attention has been called to the recent opinion of the supreme court of the United States in *Steers v. Beck*, 10 Fed. Rep. 350.

The opinion of the court in that case is very exhaustive, and fully and conclusively settles the legal question under consideration adversely to the appellant. In that case the identical question in principle involved here was presented, and it was held that a homestead claimant's riparian rights

attached from the date of his settlement, provided he complied with the law and obtained a patent for the land, and that when such patent was issued it related to the date of settlement and cut off the right to divert a stream of water running through such homestead. But the plaintiff claims to have the superior right to this water, and he seeks to prove title to the same in two ways: 1. Through an ex-sheriff's deed, offered in evidence, purporting to convey certain ditches and water rights of Hinckler to A. J. Lawrence; and 2. By prior appropriation and adverse possession of the water for more than ten years.

2. These claims will therefore be examined. The deed of ex-Sheriff Boyd, of Baker County, is dated the twenty-fourth day of April, 1877. The deed recites that the execution upon which the sale was made was tested the 30th of May, 1866, on a judgment rendered the same day by the circuit court of the state of Oregon for Baker County in favor of Louis Pfeffenberger & Co., and against Christian Hinckler. The date of the levy is not recited in the deed, but it is recited that the sale was made on the seventeenth day of September, 1874, more than eight years after the date of the execution. The amount of judgment is not mentioned, but the deed recites that the sum of three hundred dollars was realized upon the sale, and it is stated that the sale was confirmed on the thirteenth day of October, 1875. After reciting the sale of the two ditches running through Hinckler's homestead, before referred to in this opinion, and numbered 1 and 2, the deed undertakes to convey the same to A. J. Lawrence. The respondent takes several objections to this deed; one is, that no judgment was offered in evidence, and therefore it is not shown that the execution recited in the deed was legally issued. An execution, regular upon its face, emanating from a court of competent jurisdiction, will protect an officer who obeys it; but the rule is different when a purchaser claims under an execution sale. In such case it is well settled that a person seeking to recover property, and basing his claim upon an execution sale, must prove the judgment upon which the writ issued: 2 Freeman on Executions, sec. 350; *McRae v. Daviner*, 8 Or. 63.

3. It is next objected that the execution, at the time of the sale, was dead in the hands of the ex-sheriff; that the official life of the sheriff had terminated, and that the writ, by lapse of time, had ceased to be of any validity for any purpose whatever. This objection must also prevail. By section 278, Hill's

Code, an execution is returnable within sixty days after its receipt by the sheriff to the clerk's office from whence it issued; and by section 293, this time may be enlarged thirty days, by the consent of the plaintiff indorsed upon the writ. In this case it does not appear that the officer had made a levy under the execution while it was still in force. The sole question, therefore, is, whether or not a sheriff may hold an execution until long after the return day, and until his term of office has expired, and then make a levy and sale. No authority was cited upon the argument to uphold such a proceeding, and I think none can be found. On the contrary, such a writ is *functus officio*, and confers no authority whatever, and any attempted levy and sale by virtue of it are nullities: Freeman on Executions, secs. 58, 106; *Lehr v. Rogers*, 3 Smedes & M. 468; *Kane v. Preston*, 24 Miss. 133; *Dale v. Metcalf*, 9 Pa. St. 108; *Cash v. Tozer*, 1 Watts & S. 519.

4. Another difficulty presents itself. The two ditches dug by Hinckler, and which are claimed to have been sold by virtue of this execution, were dug mainly through his homestead. One was used exclusively to irrigate his land, and the other, also, after a small placer mine had been worked out. Without the use of this water upon the land it would be of but little value, and could probably never have been occupied as a homestead or for any agricultural or horticultural purpose. I think, therefore, that we must treat the ditches, and the water in them flowing over this homestead, and used for the purpose of irrigating it, as a part of the land itself, and not severable therefrom. In such case, the homestead is exempt from liability for debts contracted prior to the issuing of the patent: *Clark v. Bayley*, 5 Or. 343.

5. Finally, it is objected that an ex-sheriff has no power, in this state, to make a deed to property sold on execution. This question appears to have been considered by this court in *Moore v. Willamette T. & L. Co.*, 7 Or. 359, in which the conclusion was reached that the sheriff in office at the time the certificate is produced and the deed demanded is the proper officer to make the deed, and not the one who made the sale, and whose term of office has expired. The plaintiff does not use or seek to use either one of the Hinckler ditches described in this ex-sheriff's deed, and, so far as I can see, the only object of its introduction was to extinguish Hinckler's right to the water flowing in his ditches, and to transfer the title to the water as severed and separated from the land to the plain-

tiff by mesne conveyances from Lawrence. In other words, it is claimed that by this deed Lawrence acquired this right to the water, and that he or his successors in interest might lawfully divert it into other ditches, and take it for their own use and benefit, and that Hinckler's right to the water, whether as riparian owner or first appropriator, thus become vested in Lawrence and his successors in interest. If there were no valid objection to the deed, and the land and water where it flowed had been subject to levy and sale, I doubt very much whether the results claimed by the appellant would have followed. What Lawrence claimed to have acquired by that sale were the ditches across Hinckler's land and the water in them. I do not see how it gave them any right to the water before it entered the ditches, or conferred upon him the right to go higher up the stream, and there dig ditches of his own and take the water out at another and different place. But it is unnecessary to decide this question, for the reasons already indicated.

6. The remaining question is, whether or not the plaintiff and those under whom he claims had acquired a title to this water by adverse user prior to the commencement of this suit. Did the plaintiff and those under whom he claims have such open, exclusive, notorious, and continuous adverse use of this water as to bar the rights of the defendant either as riparian owner or first appropriator of it? On this subject I have carefully read all of the plaintiff's evidence two or three times, to ascertain the real foundation of his claim, and it all rests on the ex-sheriff's deed to Lawrence. One Davis claims to have been in possession of the water in Hinckler's ditches as Lawrence's tenant, and he delivered possession to Tarter and Huffman, from whom the plaintiff seeks to deraign title; but the possession was never exclusive, and it was not continuous. Hinckler, as long as he lived, firmly asserted his right to this water against all claimants, and maintained it with so much firmness that he lost his life in a difficulty with Davis growing out of the disputed claims to the water now in controversy. Giving full effect to the evidence on each side, and it appears that for several years no one had the exclusive use of the water; sometimes one was using it, and then another, but the possession of none of the claimants was continuous or of such a character as to constitute adverse possession against the others. It was intimated on the argument by the appellant's counsel that the water in controversy ought equitably to be

divided between the parties; but I am unable to find in the evidence anything whatever upon which a division might properly be made.

Finding no error in the decree of the court below, it must be affirmed.

PUBLIC LANDS—RIGHTS OF SETTLER BEFORE PATENT ISSUES.—The possessory rights of settlers upon public lands are protected by state statutes, and when these rights are infringed, remedy must be sought through the provisions of such statutes: *Adkison v. Hardwick*, 12 Col. 581. A settler under the homestead law may alienate: *Rose v. Nevada etc. Co.*, 73 Cal. 385; *Stinson v. Geer*, 42 Kan. 520; *Hyde v. Holland*, 18 Or. 331; mortgage: *Lang v. Morey*, 40 Minn. 396; 12 Am. St. Rep. 748, and note; or dedicate his homestead for public purposes, where he has complied with all the requirements of the law, even before a patent has issued to him: *Rube v. Sullivan*, 23 Neb. 779. But see *Nichols v. Council*, 51 Ark. 26; 14 Am. St. Rep. 20; *Marshall v. Cowles*, 48 Ark. 362, in which a different rule is laid down in Arkansas. A homestead claimant may maintain an action of trespass: *Whittaker v. Pendola*, 78 Cal. 296; *St. Onge v. Day*, 11 Col. 368; or defeat an action of ejectment brought upon the strength of prior possession: *Goodwin v. McCabe*, 75 Cal. 584; or may attack a void patent already issued for the land: *Foss v. Hinkell*, 78 Cal. 159; or maintain or defend any action as owner: *Morrison v. Coleman*, 87 Ala. 655.

OFFICERS, PROTECTION OF, BY PROCESS.—Officers are protected by writs regular upon the face thereof and issued from courts of competent jurisdiction: *Rice v. Miller*, 70 Tex. 613; 8 Am. St. Rep. 630, and note.

JUDICIAL SALES.—A purchaser at a sheriff's sale buys at his own risk: *Goodbar v. Daniel*, 88 Ala. 583; 16 Am. St. Rep. 76; *Frost v. Atwood*, 73 Mich. 67; 16 Am. St. Rep. 560, and note. He acquires no title at a sale under a void judgment: *Horan v. Wahrenberger*, 9 Tex. 313; 58 Am. Dec. 145.

SHERIFF'S DEED—AS TO THE LIMITATION OF THE TIME IN WHICH A SHERIFF'S DEED MAY ISSUE, see note to *Rucker v. Dooley*, 95 Am. Dec. 620.

CASPARY v. CITY OF PORTLAND.

[19 OREGON, 496.]

PLEADING EXHIBITS.—A schedule not recited in full in a pleading can only be made part thereof by marking it so that it can be identified, and reciting in the pleading that such exhibit is so marked and made part of it.

MUNICIPAL CORPORATIONS—LIABILITY FOR WRONGFUL ACT OF OFFICER.—In order to make a municipal corporation impliedly liable, on the maxim of *respondet superior*, for the wrongful acts or negligence of its officer, it must be shown that he was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer, and also that such wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which devolved upon him by law, or by the direction or authority of the corporation.

MUNICIPAL CORPORATIONS — PLEADING OFFICER'S LIABILITY FOR WRONGFUL ACTS. — No general liability exists on the part of a municipal corporation for the wrongful acts of its officers or servants, and if such liability exists in any case, it is because of the particular facts in the case, which must be specifically alleged in the complaint.

ACTION to recover damages for the conversion of personal property. A demurrer to the complaint was sustained, and judgment rendered thereon. Plaintiff appealed. The complaint was in the following language, after stating the title of the cause: "Johanna Caspary and J. Octavia Caspary, the plaintiffs in this action, complain of the defendant herein, and for cause of action allege that the defendant, the city of Portland, is a municipal corporation created by and existing under a law of the state of Oregon entitled 'An act to incorporate the city of Portland,' approved October 24, 1882, and acts amendatory thereof; that during all the times hereinafter mentioned the plaintiffs were and now are the owners of and entitled to the possession, in their own right, of all the personal property described in the following schedule No. 1, and that the same was of the value stated therein; that at all times herein mentioned the plaintiffs were and now are entitled to the possession of the personal property described in the following schedule No. 2, as bailees for one Joseph Windle, and that it was all of the value stated in said schedule No. 2; that the defendant, the city of Portland, on or about the first day of November, 1888, unlawfully took and carried away all of the above mentioned and described property, and unlawfully converted and disposed of the same to its own use, to the damage of plaintiffs in the sum of \$2,069.85; wherefore plaintiffs demand judgment against defendant for \$2,069.85. and for their costs and disbursements herein."

H. T. Bingham, for the appellant.

W. H. Adams, for the respondent.

STRAHAN, C. J. To sustain the ruling of the court below, counsel for the respondent has argued two propositions in this court: 1. That the schedules mentioned constitute no part of the complaint, and that therefore the complaint contains no description of the property alleged to have been converted, or statement of value; and 2. That the defendant being a municipal corporation, and necessarily acting through its officers, it ought to appear that, at the time of the alleged wrongful acts, the officers were engaged in the performance of

some corporate act, or that the officer doing the act was not an independent public officer.

These questions will be examined in the order stated.

1. The facts constituting the plaintiff's cause of action must be alleged in the complaint. The appellant's counsel insists that, taking the complaint and schedules referred to together, they do contain every allegation necessary. We think that must depend on whether or not the schedules constitute a part of the complaint. The schedules contain various items of personal property, and opposite each item are figures showing the value thereof; but they are in no way identified or marked as exhibits, nor is it stated in the pleading that they are attached or made a part of it. If these schedules had been marked so that they could be identified with certainty, and then annexed to the complaint as a part thereof, and these matters had appeared in the complaint, we think, according to the constant practice in this state, they would constitute a part of the pleading, not for the purpose of supplying necessary allegations therein, but for the purposes of description and itemizing the values. It is true, some of the authorities cited by respondent's counsel hold that exhibits cannot be made a part of the pleading, but for the purposes above indicated, the practice in this state has been otherwise since the adoption of the code, and we are unwilling to disturb it. But to make an exhibit a part of the record, it must be attached and identified, as in *Morrison v. Crawford*, 7 Or. 473. It is true, in that case, the exhibits were attached to a bill of exceptions, but as much certainly ought to be observed in the preparation of a pleading, and we can perceive no reason for a different rule. Counsel for appellant referred to section 83, Hill's Code, but I fail to see that that section has any application to the question presented by this record.

2. Numerous authorities are cited by counsel on the other question, but none of them seem to be identical with the question presented by this record. The complaint alleges the conversion of chattels by the defendant. Now, it is manifest that the defendant could only do the act, if at all, through some of its officers or agents. An individual is liable to a person injured for any wrongful act causing injury; but a municipal corporation is not liable for the torts of its officers or agents, except under circumstances and conditions not necessarily applicable to an individual. In fact, the liability

of such corporation for the acts of its officers or servants is somewhat exceptional: 2 Dillon on Municipal Corporations, secs. 949 et seq. No general rule has been formulated on the subject, and it is said by some of the authorities that all the courts can safely do is to determine each case as it arises. Under the allegations contained in this complaint, the court is unable to say whether the maxim of *respondeat superior* applies to this case or not. The pleader has not seen proper to develop the facts of his case far enough to enable the court to determine that question. The plaintiff's allegations assume it, without averring a single fact upon which the assumption could properly rest. The best and latest authority on the subject says, in substance, that if the officers or servants are elected or appointed by the corporation, in obedience to the statute, to perform a public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable.

It will thus be seen that, on general principles, it is necessary, in order to make a municipal corporation impliedly liable, on the maxim of *respondeat superior*, for the wrongful acts or negligence of an officer, that it be shown that the officer was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and also that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation: 2 Dillon on Municipal Corporations, sec. 974. A brief reference to some of the cases will further illustrate this proposition. In *Morrison v. City of Lawrence*, 98 Mass. 219, it was held that a city or town could not be held liable in damages for the act of a person unless it appeared that the injury was inflicted by a servant or agent of the city or town while engaged in the legitimate exercise of the service or business for which he was employed. So in *Mitchell v. Rockland*, 52 Me. 118, it was held that neither the relation

of master and servant, nor of principal and agent, exists between a town and its health or police officers; nor was the town liable for their unlawful or negligent acts. So in *Brown v. Inhab. of Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709, it was held that one who suffered damage by reason of the neglect or unskillfulness of the selectmen of the town, or the physician employed by them in the performance of the duties imposed on town officers by Revised Statutes, chapter 14, in relation to the small-pox, had no remedy against the town therefor. And the same principle is announced by many other cases: *Crumbine v. Mayor etc.*, 2 McAr. 578; *Anthony v. Inhab. of Adams*, 1 Met. 284; *Buttrick v. City of Lowell*, 1 Allen, 172; 79 Am. Dec. 721; *Cushing v. Inhab. of Bedford*, 125 Mass. 526; *Pollock v. Louisville*, 13 Bush, 221; 26 Am. Rep. 260; *Everson v. Syracuse*, 100 N. Y. 577; *Hilsdorf v. St. Louis*, 45 Mo. 94; 100 Am. Dec. 352; *City of Richmond v. Long's Adm'r*, 17 Gratt. 375; 94 Am. Dec. 461; *Ogg v. City of Lansing*, 35 Iowa, 495; 14 Am. Rep. 499; *Dargan v. Mayor etc. of Mobile*, 31 Ala. 469; 70 Am. Dec. 505; *Alcorn v. Philadelphia*, 44 Pa. St. 348; *Bennett v. New Orleans*, 14 La. Ann. 120; *Stewart v. New Orleans*, 9 La. Ann. 461; 61 Am. Dec. 218. These are only a few of the cases that might be cited holding that a municipal corporation is not liable for the torts of its officers under the various conditions stated. Whether they would apply to the real facts in this case, we are not permitted to know, for the reason the plaintiff's complaint does not disclose the facts upon which they seek a recovery. The foregoing citations abundantly show that there is no general liability on the part of a municipal corporation for the acts of its officers or servants, and that if such liability exist in any instance, it is because of the particular facts of the case. We think the better rule of pleading in such actions is to allege in the complaint the facts upon which the pleader relies for a recovery; in other words, to plead specifically. In any event, enough must be alleged to show that the city was not acting in its governmental capacity as one of the agencies of the state in enforcing the necessary health and police regulations within its limits, and that the wrong complained of was done by an officer of the city while in the legitimate exercise of some duty of a corporate nature which was devolved upon him by law or by the direction or authority of the corporation. We do not hold that these elements would be sufficient, but they necessarily enter into the question of the city's liability, and must in some

manner appear, before the city is liable. This must be so, on principle. Why should the tax-payers of the city of Portland be mulcted in damages when they have done no wrong, and, it may be, had no agency in the transaction complained of further than to carry into effect some positive requirement of the charter by means of their municipal government?

We think the court did not err in sustaining the demurrer, and its judgment is affirmed.

MUNICIPAL CORPORATIONS — LIABILITY FOR WRONGFUL ACT OF OFFICER OR SERVANT. — A city is not liable for a trespass committed by a company working for it under contract, where it does not appear that it expressly or impliedly authorized the wrongful act: *Tissot v. Great S. T. & T. Co.*, 39 La. Ann. 996; 4 Am. St. Rep. 248. Municipal officers in the performance of their duties act as public agents, not as the agents of the city, and do not ordinarily render the city responsible for their acts: *Bulger v. Eden*, 82 Me. 352; *Prather v. Lexington*, 13 B. Mon. 559; 56 Am. Dec. 585; *Rowland v. Gallatin*, 75 Mo. 134; 42 Am. Rep. 395. As to the liability of a municipality for the unauthorized acts of its officers, see note to *Hilsdorf v. St. Louis*, 100 Am. Dec. 358-360. Trespass will lie against a city for acts done in obedience to its orders: *Allen v. Decatur*, 23 Ill. 332; 76 Am. Dec. 692, and note.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

**HAVERLY v. STATE LINE AND SULLIVAN RAILROAD
COMPANY.**

[135 PENNSYLVANIA STATE, 50.]

NEGLIGENCE — PROXIMATE AND REMOTE CAUSE. — The test by which the line is to be drawn between proximate and remote cause, in reference to liability for the consequences of negligence, is, whether or not the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the negligence. In the first instance, liability attaches; in the latter, it does not.

NEGLIGENCE — PROXIMATE CAUSE, WHEN QUESTION FOR JURY. — Where a railroad company negligently sets a fire on its right of way, near the property of another, who makes unsuccessful attempts to extinguish it, and a wind arising the next day, the fire is communicated to and destroys his property, the question as to whether or not the original act of setting the fire was the proximate cause of the injury, notwithstanding the lapse of time and the wind, is for the jury, and not for the court, to determine.

CONTRIBUTORY NEGLIGENCE — SPREAD OF FIRE. — Where one has knowledge of the existence of a fire on the premises of another, which is likely to destroy his own property, he must use reasonable care and diligence to prevent it from spreading thereto, and whether he has done this or not is for the jury to determine.

CASE to recover for the loss of lumber by fire, through the alleged neglect of the defendant company. The plaintiff was engaged in lumbering on land adjoining defendant's track, and on the afternoon of May 11, 1880, between four and five o'clock, one of its trains passed over that part of its track, setting fire to a rotten stump in the roadway. This fire was started by reason of defects in defendant's locomotive. When

the fire was discovered, plaintiff sent his employee to extinguish it, and the latter reported having done so. The next morning at about ten o'clock the stump was found to be still on fire, and plaintiff sent another employee to extinguish it, who went away believing that he had succeeded in so doing. At twelve o'clock of the same day, however, the same fire again burst forth, and a wind arising at that time, plaintiff was unable to subdue the fire, and his logs and lumber were consequently destroyed. Verdict and judgment for plaintiff, and defendant appealed.

Rodney A. Mercur, Edward Overton, and John F. Sanderson, for the appellant.

H. N. Williams, I. McPherson, E. J. Angle, and R. H. Williams, for the appellee.

MITCHELL, J. The test by which the line is to be drawn between proximate and remote cause, in reference to liability for the consequences of negligence, has been firmly established by the three cases of *Pennsylvania R'y Co. v. Kerr*, 62 Pa. St. 353; 1 Am. Rep. 431; *Pennsylvania R'y Co. v. Hope*, 80 Pa. St. 373; 21 Am. Rep. 100; and *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293; 27 Am. Rep. 653. It is most elaborately expressed by Chief Justice Agnew in *Pennsylvania R'y Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100, in the following language: "The jury must determine, therefore, whether the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause,—the negligence of the defendants"; and the rule is again put somewhat more tersely by the present chief justice in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, as follows: "The injury must be the natural and probable consequence of the negligence; such a consequence as . . . might and ought to have been foreseen by the wrong-doer as likely to flow from his act."

The three leading cases above referred to, though frequently cited on opposite sides of the same argument, are not at all in conflict in principle. The different results which were reached in them depended not on any different view of the law, but of the facts, and on the application of the familiar doctrine that where a plain inference is to be drawn from undisputed facts,

the court will decide it as a matter of law. In *Pennsylvania R'y Co. v. Kerr*, 62 Pa. St. 353, 1 Am. Rep. 431, the negligence had been held by the court below to be the proximate cause of the plaintiff's loss. This court held that it was remote, and did not award a new *venire*, but said that it would do so if plaintiff should desire it upon grounds shown. The question was then new; and from what was said about the *venire*, the court itself does not seem to have been entirely clear that it should be decided as matter of law. It may be doubted whether, on the same facts, the court would not now send it to a jury. Certainly no subsequent case has assumed to decide where the facts were so near the line. *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, was a much clearer case, and so were *Pittsburgh etc. R'y Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580, *West Mahanoy Township v. Watson*, 116 Pa. St. 344, 2 Am. St. Rep. 604, *South Side Pass. R'y Co. v. Trich*, 117 Pa. St. 390, 2 Am. St. Rep. 672, and the other cases where the court has pronounced the negligence to be remote as matter of law. But whatever the result of the views taken of the facts in these cases, the principles of decision are the same in all.

In the present case, the learned judge left the question of proximate or remote cause to the jury, in substantial conformity with the doctrine of *Pennsylvania R'y Co. v. Hope*, 80 Pa. St. 373; 21 Am. Rep. 100. Appellant, however, claims that the succession of events was so broken as to bring the case under *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, and require the judge to direct the jury in its favor. The break in the chain of events was merely a gap in the time. Had the fire extended from the stump to plaintiff's lumber without interval, on the same afternoon, this case would have been exactly parallel with *Pennsylvania R'y Co. v. Hope*, 80 Pa. St. 373; 21 Am. Rep. 100. But the fact that the fire smoldered awhile in the stump, and after it was supposed to have been extinguished, broke out again the next day, while it makes the conclusion less obvious that the damage was done by the same fire, does not interpose any new cause, or enable the court to say as matter of law that the causal connection was broken. The sequence from the original fire to the burning of plaintiff's logs was interrupted by two apparent cessations of the fire, but the jury have found that the cessations were only apparent, leaving intervals of time in the visible progress of the fire, but making no real

break at all in the actual connection. In *Pennsylvania R'y Co. v. Kerr*, 62 Pa. St. 366, 1 Am. Rep. 431, it is said by Thompson, C. J., that the rule "is not to be controlled by time or distance, but by the succession of events"; and in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, Trunkey, P. J., in charging the jury, had quoted the foregoing, and added: "Whether the fire communicated to the plaintiff's property within a few minutes, or after the lapse of hours, from the negligent act, may be immaterial." It is said in this case that the agents of plaintiff on the ground did not anticipate a farther spread of the fire after the interval of time, and therefore it cannot be assumed that the defendant should have anticipated it. But the agents of plaintiff did not expect it, because they thought the fire had been put out, not because they did not see the danger of its spreading while it was burning; and this was the danger that appellant was bound to contemplate, to wit, the natural and probable consequence of the original act, not the effect of the supposed extinguishment subsequently. The pauses in the progress of the fire, therefore, and the lapse of time, while matter for the consideration of the jury in determining the continuity of effect, do not of themselves make such a change as requires the court to say that they break the connection.

But it is argued that it was not until the next morning after the fire started in the stump, and during the time when it was apparently extinguished, that the wind rose, and became a new cause of the spread of the fire to plaintiff's lumber. This, however, was, like the point already considered, dependent on the circumstances. In *Pennsylvania R'y Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100, one of the facts was a strong wind, which carried the fire; and so, also, it was in *Pennsylvania etc. R'y Co. v. Lacey*, 89 Pa. St. 458, and in *Lehigh V. R'y Co. v. McKeen*, 90 Pa. St. 129; 35 Am. Rep. 644; and in this last case Trunkey, J., says the jury "could also determine whether dry weather and high winds in the spring-time are extraordinary, and whether, under these conditions, . . . the injury was within the probable foresight of him whose negligence ran through from the beginning to the end." No doubt a hurricane or a gale may be such as to be plainly out of the usual course of nature, and therefore to be pronounced by the court as the intervention of a new cause. Such a wind would be like the flood in *Morrison v. Davis*, 20 Pa. St. 171; 57 Am. Dec. 695. But the ordinary danger of wind helping a fire to

spread is one of the things to be naturally anticipated. The lapse of time before the wind rose, in this case, was therefore not clearly a new cause to be so pronounced by the court, but a circumstance to be considered, with the others, by the jury.

On this branch of the case, generally, the injury was not more remote from the alleged cause than in *Pennsylvania R'y Co. v. Hope*, 80 Pa. St. 373; 21 Am. Rep. 100; *Pennsylvania etc. R'y Co. v. Lacey*, 89 Pa. St. 458; and *Lehigh V. R'y Co. v. McKeen*, 90 Pa. St. 129; 35 Am. Rep. 644; and not so much so as in *Fairbanks v. Kerr*, 70 Pa. St. 86; 10 Am. Rep. 664; and *Oil Creek etc. R'y Co. v. Keighron*, 74 Pa. St. 316, — in all of which the question was held to have been properly submitted to the jury.

There remains only the question of contributory negligence, and we do not find any evidence that would have justified taking this from the jury. If plaintiff had not known of the fire in the stump, he would have had no duty in regard to it; but, knowing of it, he was bound to take all reasonable and practicable measures to prevent its spreading to his lumber. He was not an insurer. The measure of his duty in this regard was reasonable care and diligence, and whether he used these was fairly and accurately submitted to the jury. That they found against the defendant's view was no fault of their instruction as to the law.

Judgment affirmed.

NEGLIGENCE — PROXIMATE CAUSE. — As to what constitutes the proximate cause of an injury occasioned through negligence, see *West v. Ward*, 77 Iowa, 323; 14 Am. St. Rep. 284, and note 286, 287. Where it is apparent that a house would have been destroyed in the storm which occurred, regardless of the railway embankment, by which the depth of the water was increased, it may be found that the storm was the proximate cause of the destruction, and not the embankment: *Ifrey v. Sabine etc. R'y Co.*, 76 Tex. 63. As to the proximate and remote cause of fires alleged to have been started through the agency of a railway company, see *Hart v. Western etc. R. R. Co.*, 13 Met. 99; 46 Am. Rep. 719, and note; *Perley v. Eastern R. R. Co.*, 98 Mass. 414; 96 Am. Dec. 645, and note; *Flynn v. San Francisco etc. R. R. Co.*, 40 Cal. 14; 6 Am. Rep. 595, and note 597-600; *Kellogg v. Chicago etc. R. R. Co.*, 26 Wis. 223; 7 Am. Rep. 69, and note; *Pennsylvania R. R. Co. v. Hope*, 80 Pa. St. 373; 21 Am. Rep. 100; *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293; 27 Am. Rep. 653, and foot-note.

PROXIMATE CAUSE IS ORDINARILY A QUESTION FOR THE JURY TO DECIDE: *Lehigh V. R. R. Co. v. McKeen*, 90 Pa. St. 122; 35 Am. Rep. 644, and note; *Fent v. Toledo etc. R'y Co.*, 59 Ill. 349; 14 Am. Rep. 13; *Webb v. Rome etc. R. R. Co.*, 49 N. Y. 420; 10 Am. Rep. 389; *Toledo etc. R'y Co. v. Pindar*, 53 Ill. 447; 5 Am. Rep. 57.

RAILWAY COMPANIES — FIRES — CONTRIBUTORY NEGLIGENCE OF PLAINTIFF. — While the railway company must keep combustible materials away from its right of way: *Rost v. Missouri P. R'y Co.*, 76 Tex. 169; the owner of lands contiguous to a railway must also use care with respect to combustibles upon his land; and he cannot recover for injuries by fire thus arising, unless the negligence of the company was greater than his own: *Ohio etc. R. R. Co. v. Shanefelt*, 47 Ill. 497; 95 Am. Dec. 504. But see *Richmond etc. R. R. Co. v. Medley*, 75 Va. 499; 40 Am. Rep. 734, and foot-note. In an action to recover for injuries sustained through fires alleged to have been negligently set upon a railway company's right of way, and allowed to spread upon plaintiff's premises, the negligence of the defendant as well as the contributory negligence of the plaintiff are questions of fact for the jury: *Clune v. Milwaukee etc. R. R. Co.*, 75 Wis. 532.

BRISTOR v. TASKER.

[135 PENNSYLVANIA STATE, 110.]

TRUST DEEDS — POWER TO REVOKE. — A trust deed containing no power of revocation, executed by a single woman, and not in contemplation of marriage, conveying her property in trust to pay to her the income during life, and at her death, in trust for her appointees, or in default of appointment, in trust for her heirs, creates a passive trust, which the grantor may revoke at any time, and call for a reconveyance, especially when it appears that there was no intention to make an irrevocable gift, and that the deed was executed without the advice of counsel, and upon the assurance by the contingent beneficiaries that it could be revoked, and that the only purpose of its execution has been accomplished.

BILL praying for the revocation and cancellation of a deed of trust executed under a mistake of fact. Judgment denying relief and dismissing the bill. Plaintiff appealed.

M. A. De Long Van Horn, for the appellant.

W. Henry Sutton for the appellee.

GREEN, J. The bill in this case is filed by the *cestui que trust* against her trustee, and also against the guardian of her children. The trustee filed an answer admitting all the facts set forth in the bill, and the guardian, a corporation, stating that it had no knowledge of the facts, said that it had inquired as to their truth, and from information received knew of no reason for doubting their truth. The more correct practice would have been to refer the case to a master, and have him to take testimony and make a report upon the facts alleged in the bill. Then any decree which the court might have made would have been founded upon facts established by proof, and not upon the mere allegations of the bill admitted by the answer. A case might easily arise upon the

latter mode of proceeding which could not command the confidence of a court, and which, if permitted to prevail, might work great injustice to persons ultimately interested. It is not necessary, however, for us to hesitate in proceeding upon the facts set out in the bill, and admitted in the answer, since it does not appear that any persons are interested in the trust except the *cestui que trust* and her trustee.

By the terms of the deed the grantor's property was all conveyed by the *cestui que trust* to the trustee in trust to receive the rents, issues, and profits of the real estate, and the interest, income, and dividend of the personal estate, and pay it all over to the grantor as received, or to let her receive it directly, during the whole term of her life, and after her death, in trust for the use of such persons as she might appoint, and on failure of appointment, in trust for her right heirs. In such a case as this we have several times decided that the trust is a mere passive trust, which can be terminated at any time at the mere will of the *cestui que trust*, who may demand a reconveyance of the whole estate from the trustee. The reason that she has such control over the trust is, that she alone has any interest in the trust property, being entitled to the whole income of the estate during her life, with a power of absolute disposal of the *corpus* of the estate, by way of appointment, to any persons she may please, and on failure of any appointment, the estate to go to her heirs. This gives to the *cestui que trust* really a fee-simple estate, and we so held in the cases of *Dodson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 586; *Yarnall's Appeal*, 70 Pa. St. 335, and in other cases there cited. It may be added that in the present case the *cestui que trust* had the power under the deed to direct the absolute sale and disposal of the whole trust property during her life, and the reinvestment of all the proceeds in such manner as she pleased. If the question were directly before us, it can scarcely be doubted that, under the authorities cited and the manifest principles applicable to the subject, we would hold the estate of the *cestui que trust* to be an absolute fee-simple estate, which would enable her to terminate the trust at any time she might so elect.

There are, however, ample reasons found in the facts set out in the bill, and admitted in the answer, for granting the relief prayed for. The bill explicitly states that at the time of the execution of the deed of trust the plaintiff was a single woman, without any contemplation of marriage, and had

no motive or reason for making a trust which would deprive her of an absolute ownership of her property. She also alleges that she was induced to make the deed by her mother and grandfather, in order to induce her sister, who was married to a spendthrift husband, to execute a similar deed of trust for her property; and further, that she was informed by her mother and grandfather at the time that as she was a single woman not contemplating marriage, her case was different from that of her sister, and that she could at any time thereafter, if dissatisfied with the trust, revoke the same; that she afterwards, and at the request of her grandfather and mother, called upon the gentleman who was the counsel for them, and informed him of her desire and its purpose, and that the counsel thereupon prepared three deeds of trust, one for her mother, one for her sister, and the other for herself, all of which were duly executed, and in all of them there was no power of revocation; that the counsel supposed that the deed for the plaintiff was to be prepared like the others, without a power of revocation, and acting upon this mistake he prepared her deed in the same manner as the others, and did not inform her that it did not contain a power of revocation, nor even as to what were the contents of the deed of trust signed by her. She further states that she executed the deed of trust prepared for her, believing that she had power to revoke or change the same at any future time she might desire to do so, and remained of that belief until about two years before the bill was filed, when she was informed that there was no power of revocation in the deed by an attorney to whom she applied to have the trust set aside. She also says that she was not advised, and did not know, that if she married and bore children she could use no part of the principal of her estate. It is also the fact that the deed of trust was made to her own grandfather.

The facts of this case are much stronger in favor of the relief sought than in the cases heretofore considered by this court. The motive of the conveyance was entirely foreign to any purpose or desire to strip the plaintiff of the control of her property. It was entirely for the sake of a sister who, being married to a spendthrift, had an urgent reason for protection by an irrevocable deed of trust, but whose action it was represented to the plaintiff would be promoted by a similar deed on her part. Then, too, it was her mother and her grandfather who asked and urged her to make the deed. To

an appeal coming from such a source she would be peculiarly sensitive, and very properly so. To every statement made by them to her she naturally gave the most implicit confidence, as she was justified in doing. When they told her she could at any time revoke the deed, she had a right to believe them, and to act upon the faith of their statement. It was a mistake for them to tell her this, but it was an innocent mistake on their part. It not only misinformed her, but would operate to prevent her from employing independent counsel for herself, and would naturally lead her to resort to their counsel for the preparation of the necessary deed. And here, again, she became the victim of another innocent but injurious mistake. The counsel employed, knowing the object of the whole transaction to be the protection of the married sister, naturally supposed that the three deeds were to be alike, and that there was no necessity of his informing the plaintiff either that there was no power of revocation in the deed intended for her or that without such a power the deed would be irrevocable. She executed the deed under the influence of all these mistakes, and hence presents a strong and well-recognized case for the intervention of equity. Moreover, the entire object and purpose of the execution of the deed by her were fully accomplished at once, and they have no further existence. The married sister and her husband did execute an irrevocable deed of the sister's property, and all reason for continuing the trust as to the property of this plaintiff ceased forthwith. All of the considerations which we have thus indicated are potential in equity in securing the relief now invoked.

The subject of granting such relief is not at all new, either in England or in this commonwealth. This court has administered such relief in several cases, and after the most mature deliberation. In *Russell's Appeal*, 75 Pa. St. 269, which is a noted and a leading case, the whole subject was so exhaustively discussed by the learned master in the court below, and by this court, that it is no longer necessary to review the authorities or investigate the doctrine. It is the accepted and well-settled law in this commonwealth, illustrated and enforced in a number of important causes. We there held that the absence of a power of revocation in such a deed is a circumstance to be taken into account, and entitled to more or less weight, according to the other circumstances of the case, in granting the relief sought. Mr. Chief Justice Agnew, in delivering the opinion of the court, said: "It may be ad-

mitted, also, that the mere omission of counsel to advise the insertion of a power to revoke will not alone be a ground in equity to set aside a voluntary conveyance. But the absence of such a power, and the failure of counsel to advise upon it, are circumstances of weight, when joined to other circumstances, tending to show that the act was not done with a deliberate will. Therefore, when the facts show that the instrument was executed without advice or reflection, and without an intention to bind the party after the reasons and motives for executing it have passed away and the party is again *sui juris*, a court of equity will and ought to relieve, as against mere volunteers claiming without consideration or a reasonable motive for continuing the donor's disability. . . . The cases cited by the master show very distinctly that the actual intent of the donor is necessary, and in the absence of a certain intent to make the gift irrevocable, the omission of a power to revoke is *prima facie* evidence of a mistake, and casts the burden of supporting the settlement upon him who, without consideration or a motive to benefit him or protect the donor, claims a mere gratuity against one who is *sui juris* and capable of taking care of his own estate. The mistake is not one simply of law. That would be so if the settlor, in full view of all the clauses and provisions in the deed, would interpret them for himself as being in law adequate to confer a power of revocation upon him, when in truth the law would not so expound the instrument. But in a case such as this the mistake is one of fact, so mixed with the legal effect of the writing that equity will use the mistake of fact as means of relief."

In *Miskey's Appeal*, 107 Pa. St. 611, we applied this doctrine in a different state of circumstances, and set aside a voluntary deed, partly because of the absence of a power of revocation and of the absence of proof of a distinct intention to make the gift irrevocable. The exertion of parental influence, and the fact that the grantor had no independent counsel, were circumstances which we regarded as of weight in determining to set aside the deed. In *Rick's Appeal*, 105 Pa. St. 528, we set aside a voluntary deed because of the absence of a power of revocation, because it appeared that the grantor had no intention to deprive herself of all control of her property, because she had been misled by her brother on the subject of revocation, and because the deed was improvident. The present chief justice said, in the opinion: "If

Mrs. Peiffer signed the deed under the representation that it could be revoked, then a fraud was practiced upon her; if under the advice that she could not insert a power of revocation, she was wrongly advised; she acted under a mistake partly of law and partly of fact; she was misled by those whose duty it was to inform her, and upon whom she had a right to rely with confidence. . . . There is a line of English cases which hold that in the absence of any motive for an irrevocable gift, it is unreasonable that a voluntary conveyance should be without a power of revocation [citing several cases]. In the last case (*Hall v. Hall*, L. R. 8 Ch. 430) the rule was laid down as follows: 'The absence of a power of revocation in a voluntary deed, not impeached by any undue influence, is, of course, material, where it appears that the settlor did not intend to make an irrevocable settlement, or where the settlement is of such a nature or was made under such circumstances as to be unreasonable and improvident, unless guarded by a power of revocation.' "

Further discussion seems quite unnecessary. Other instances in which we have administered this kind of relief will be found in the opinions in the cases we have cited. We think the relief prayed for here should be granted, because there was no intention to make an irrevocable gift; because the whole purpose of the deed was accomplished when the plaintiff's married sister executed the deed for her property, — after that there was no motive or reason for continuing the present deed; because the deed contained no power of revocation; because the plaintiff was misled by her mother and grandfather telling her she could at any time revoke the deed; because she had no independent advise; because counsel who prepared the deed did not inform her of the necessity of a power of revocation, and of the effect of its absence; and because the deed is improvident and unreasonable, and was not made in contemplation of marriage.

The decree of the court below is reversed, at the cost of the appellee; the bill of the plaintiff is reinstated, and the record is remitted, with instructions to the court below to enter a decree granting the relief prayed for, in accordance with this opinion.

DEED OF TRUST. — POWER TO REVOKE. — It is well settled by a uniform line of authority that a voluntary settlement by deed of trust, completely executed, with no power of revocation reserved in the deed, cannot be revoked or set aside, except on proof of mental incapacity, mistake, fraud, or undue

influence: *Sargent v. Baldwin*, 60 Vt. 17; *Souverby v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Cobb v. Knight*, 74 Me. 253; *Wallace v. Berdell*, 97 N. Y. 13; *Viney v. Abbott*, 109 Mass. 303. In *Sargent v. Baldwin*, 60 Vt. 17, the owner of real estate conveyed it to one who executed a mortgage back, conditioned for the maintenance of the mortgagee and his wife, and for the payment of one thousand dollars, within a reasonable time after their death, to each of their three children if they survived their parents, and if they did not, then to the heirs of the deceased child, and after the death of one of the children, the mortgagor and mortgagee entered into a new agreement, by which the remaining heirs were to receive less than they were entitled to under the mortgage. The court determined that the effect of the first transaction was to create a trust in the grantee of the real estate, and to vest in each of the children of the settlor a right to the sum mentioned in the mortgage, of which they could not be divested without their consent, and consequently the new agreement was inoperative and void. Again, a mortgage conditioned for the support of the mortgagee and his wife, and also for the payment of specified sums to his two daughters, cannot be revoked nor annulled by a subsequent contract between the mortgagor and mortgagee injuriously affecting the daughters: *Howard v. Howard*, 60 Vt. 362. A single woman about to be married conveyed real and personal estate to her father, his heirs and assigns, to be held in trust by him or by a trustee appointed by the court for her separate use, exempt from liability for the debts of any husband she might have during the continuance of the trust, and also not subject to his control, the income to be paid to her during her life, and the remainder to be paid and conveyed to such child or children, his or their heirs and assigns, as she should leave. She afterwards married, her husband died, she married another husband, by whom she had issue living. Her father died, leaving several children surviving, and the court refused to appoint a new trustee. Upon a bill in equity by the husband and wife to revoke and set aside the settlement, the court decided that the trust estate did not merge in the legal estate; that the equitable estate being only for her life, and she having a legal estate in a portion only of the property as a tenant in common with the other children of the trustee, the trust could not be revoked; and that a new trustee must be appointed: *Hildreth v. Eliot*, 8 Pick. 293.

Nor can a voluntary settlement by a woman, in contemplation of marriage, in trust, for her exclusive benefit during her life, notwithstanding the marriage, be set aside after the marriage on the mere ground that the trustee was her confidential adviser, although she is able to manage the property, and wishes to regain possession of it: *Falk v. Turner*, 101 Mass. 494. A voluntary settlement by deed of trust cannot be revoked or altered by a second settlement of the same property, in the absence of a provision in the deed of settlement reserving the power of revocation to the grantor: *Sewall v. Roberts*, 115 Mass. 262; *Nearcass v. Newman*, 106 N. Y. 47. A trust deed of all of the property of the grantor to be held for his own maintenance and support, and containing a testamentary disposition of the same, is not revoked by a subsequent deed of trust, consistent with the former, and executed for the purpose of substituting a new trustee over the same and subsequently acquired property: *Rife's Appeal*, 110 Pa. St. 232.

If a wife, for the purpose of evading her husband's importunities to dispose of her lands, and for a loan from a trustee, conveyed such land in trust to pay her the income during her life, and on her death for her children, with power to sell or to convey in certain contingencies, but without reserving a

power of revocation or providing for the contingency of her surviving her husband, and the trustee sold and invested the proceeds, she is not, on the husband's death, entitled to rescind the trust: *Keyes v. Carleton*, 141 Mass. 45; 55 Am. Rep. 446. If land is conveyed in trust for the benefit of third persons and their children, yet unborn, such trust cannot be revoked or annulled, although the trustee and all the beneficiaries who are in being unite in reconveying the land to the donor free from the trust: *Isham v. Delaware etc. R. R. Co.*, 11 N. J. Eq. 227.

If both parties to a deed, apparently designed as a voluntary settlement, are present, and the customary formalities of execution take place, and the contract is apparently consummated, without any conditions or qualifications annexed, it is a complete and valid deed, though left in the custody of the grantor; and after it is actually delivered to the grantee, the right of the *cestui que trust* attaches, and the effect of the delivery cannot be controlled by any mental reservation on the part of the grantor, or by any oral condition attached to the delivery, and repugnant to the terms of the deed. It cannot be shown, therefore, for the purpose of defeating the rights of the *cestui que trust*, that the delivery was with the intent that the deed should not take effect unless again delivered, or unless the grantor afterwards determined that it should take effect, or upon any other contingency contrary to the terms of the deed. After such deed is delivered and takes effect, it is irrevocable. Its operation cannot be affected by any subsequent act of the grantor in exercising control over the property conveyed, nor any omission by the trustee to perform the duties of the trust: *Wallace v. Berdell*, 97 N. Y. 13. For, after a trust has been created and accepted, the grantor has no power to revoke it without the consent of the beneficiaries, unless such power was reserved in the declaration of trust: *Hellman v. McWilliams*, 70 Cal. 449.

Where a grantor conveyed land, in trust, to be farmed, and from the proceeds to pay him an annuity during life, the remainder of the income to his wife for life, and if he survived his wife, all the income to him for life, and after the death of both, the land to be sold, and a specified sum to be paid to three children named, the residue to be divided among all the children of the grantor and his wife, it was decided that the deed was not revocable nor testamentary: *Ritter's Appeal*, 59 Pa. St. 9. And where a married woman and her husband conveyed by deed, containing no power of revocation, certain specified property to a trustee, to pay the income thereof to the wife for life, for her sole and separate use, and after her death, in trust to convey the property to a son of such wife by a former husband, a court of equity will not, on the joint application of the wife, her present husband, and the ultimate beneficiary, decree cancellation of the deed of trust, and order any part of the subject thereof to be transferred to the ultimate beneficiary. In such case the wife, being under disability, will be protected from the undue influence which might be exercised by the husband to destroy the trust created for her sole use: *Twining's Appeal*, 97 Pa. St. 36.

In *Gulick v. Gulick*, 39 N. J. Eq. 401, a husband conveyed land to his wife by deed to hold in trust for his benefit during his life, and thereafter to sell the same and divide the proceeds among his widow, if she survived him, and their children or grandchildren, and it was held that the husband and wife could not revoke this trust and substitute therefor another trust, so as to effect the interests of the children and grandchildren.

Where the facts show an executed intention and purpose, coupled with an express trust in the donor for the benefit of his beneficiaries, unrevoked by

him at the time of his death, such a trust is valid against all except creditors, and a trust thus created cannot be revoked by the donor undertaking in his will to annex thereto special terms or qualifications inconsistent with and not expressed in the original declaration of trust: *Dickerson's Appeal*, 115 Pa. St. 498.

In the case of *Williams v. Vreeland*, 32 N. J. Eq. 135, a legatee, in consideration of a legacy of thirty thousand dollars to him, promised the testator orally to give to a third person ten thousand dollars thereof. After the testator's death the trustee admitted the trust verbally, and also by written promise, without any deceit or misrepresentation, and it was determined by the court that such trust could not be revoked by a subsequent retraction of the written promise, and that specific performance thereof would be decreed.

Where a single woman, in contemplation of marriage, indorsed notes held by her given by her children to one of her sons, and by a separate instrument in writing declared him to be her attorney and trustee to retain the custody and complete control of the notes, and directed him to keep the same, and whenever, in his judgment, she should require the interest on the notes, or any part thereof, he should collect the same and pay it to her, and upon her death return the notes to the makers, such instrument is not only a power of attorney, but also creates a complete trust, which the trustor cannot revoke at pleasure, and it makes the son not only a trustee for her benefit, but also for the benefit of the makers of the notes: *Light v. Scott*, 88 Ill. 239.

In the case of *Pingrey v. National Life Ins. Co.*, 144 Mass. 374, a party insured his life under a policy payable to him as soon as the premiums, together with such other sums as he should pay, should amount to the sums insured. The policy also provided that in case of his death prior to such time, the sum insured should be paid to his mother, and that after the payment of two full premiums it should not lapse. It was the intention of the assured to make the policy for the benefit of his mother, who furnished the money for the payment of the first premium. The insured subsequently married, and without the mother's consent, and without her ever having had possession of the policy, surrendered it to the company and took out a new policy in the same amount, payable to his wife. This policy stated that it was a continuation of the first policy. The insured died before his payments amounted to the sum insured. The court, upon this state of facts, held that the first policy was a settlement in trust for the benefit of the mother, which the insured could not revoke, and that the mother was entitled to the proceeds. To the same effect, *Garner v. Germania Life Ins. Co.*, 110 N. Y. 266.

In the case of *McPherson v. Rollins*, 107 N. Y. 316, a grantor, for the purpose of making provision for his daughter and his grandchild, conveyed to the daughter certain premises, she executing to him a mortgage thereon, stating that it was given as security for the payment of fifty dollars annually to the grandchild until she should arrive at the age of fifteen years, and thereafter the further sum of one hundred dollars until she should arrive at the age of twenty-one years. The deed and mortgage were recorded, and subsequently the grantor, at the request of the trustee, executed, without consideration, an acknowledgment of satisfaction of the mortgage, and attempted to discharge it of record. Subsequently the premises were conveyed by the trustee to an innocent purchaser for value. In an action to foreclose the mortgage it was decided that such mortgage created an irrevocable trust, and as it had not been renounced by the *cestui que trust*, the attempted discharge was in contravention of the trust, and therefore void.

Voluntary settlements by deeds of trust, if shown to have been executed

through mistake, or improvidently made, without the advice of counsel, may be revoked in equity at any time, even though it does not appear that the deed contained any power of revocation. Thus a voluntary trust deed, containing no provision for revocation, executed by a young man, whereby he parted with all control over his land, on a trust that a trustee would pay over to him the rents and profits, will be annulled, and a reconveyance to the grantor directed, when it appears that the grantor executed the deed in ignorance of its effect, and its annulment is desired by the trustee as well as by the grantor: *Kerr v. Couper*, 5 Del. Ch. 507. If a grantor makes a voluntary settlement in trust for his own benefit during life, the remainder to his devisees and legatees, and in case of his intestacy, to his heirs at law, and both the grantor and the trustee suppose the deed to be revocable, although no power of revocation is contained therein, equity will revoke the trust, and decree a reconveyance, at the request of the grantor, on the ground of mistake: *Aylsworth v. Whitcomb*, 12 R. I. 298. When, in an instrument like that in question, no deliberate intention appears to make it irrevocable, the omission of a power of revocation is *prima facie* evidence of mistake: *Aylsworth v. Whitcomb*, 12 R. I. 298; *Russell's Appeal*, 75 Pa. St. 269; *Rick's Appeal*, 105 Pa. St. 528.

A voluntary deed of trust, executed under the supposition that it was revocable, and so intended, but reserving no power of revocation, and otherwise unadvised, improvident, and contrary to the intention of the grantor, will be set aside in equity, even if the infant children of the grantor are the beneficiaries under the deed: *Garnsey v. Mundy*, 24 N. J. Eq. 243, quoting extensively from English authorities supporting this doctrine, which seems to be the settled rule in that country. In deciding the case the court said: "It is not necessary, however, to rest a decision of this case adverse to the deed on so narrow a foundation as the mere absence of a power of revocation. The circumstances under which a voluntary deed was executed may be shown with a view to impeaching its validity, and if it appears that it was fraudulently or improperly obtained, equity will decree it to be given up and canceled. In the present case, there is no room for doubt that the grantor was induced by those in whom she very justly placed confidence, and by whose better judgment she was willing to be guided, to execute a voluntary deed whose effect she and they not only did not understand, but, on the other hand, misapprehended, and which, so far from being according to their intentions, was, in two very important respects, at least, admittedly the very reverse. It was irrevocable, but they all supposed it was revocable, and intended that it should be. It deprived the grantor of the power of sale, but they all supposed that she would have that power, and intended that she should have it, clogged only by the necessity of obtaining her mother's consent and concurrence in any bargain or conveyance she might make. The deed contains no power of sale whatever. The testimony of all the parties to the transaction, the grantor, her mother, and uncle, has been taken in the cause. It satisfies me that the deed was not the pure, voluntary, well-understood act of the grantor's mind, but was unadvised and improvident, and contrary to the intention of all or them."

A purely voluntary trust deed, intended to promote the convenience and protect the interests of the grantor, and passing no present interest to third persons, may be revoked at will, although it contains no power of revocation. If such deed provides for the benefit of third persons, to take effect after the grantor's death, such provisions are testamentary and revocable, or may be regarded as covenants for posthumous gifts, and as such without consideration.

In the absence of any motive for an irrevocable gift, it is unreasonable that a voluntary conveyance should be without a power of revocation. A woman seventy-five years old, and not able to read or write, executed a deed of trust to her brother, as trustee of all of her property, and by the terms of the trust she was to receive a certain income yearly, during life, and after her death, the remainder was to be divided among certain beneficiaries. The deed was prepared by counsel, contained no power of revocation, and it appeared that it was executed without the grantor's being clearly and accurately informed of its legal effect. Some years afterward she executed a deed of revocation, and applied in equity for a reconveyance of her estate, and the court decided that the grantor had been misled by those on whom she had a right to rely, that the settlement was improvident, and that she had a right, by deed duly executed, to revoke the settlement, and compel the trustee to reconvey to her: *Rick's Appeal*, 105 Pa. St. 528.

A single woman, in contemplation of marriage, with the consent of her intended husband, and acting under the advice of counsel, made a deed of settlement of all of her estate, except a certain amount which she retained for her own use, the trustee to pay her the income for her separate use during life, and after her death to convey the estate to her children, according to testamentary appointment, excepting such provision as she might make for her husband by will; if she left no issue, then to convey to her sisters and brother, or their issue, as she might appoint; if she left no will, half of the income to go to the husband for life and half to her children; if she left no issue, or leaving any, they should die minors without issue, then to convey to her brother and sisters in fee. The deed contained no power of revocation, and the grantor did not understand that her power of appointment was restricted to her brother and sisters, but understood that if she survived her husband, she could dispose of her estate as she pleased. She gave no instructions concerning a power of revocation or of general testamentary disposition. The grantor survived her husband, who died without issue, and the court held that while the mere omission of counsel to advise the insertion of a power of revocation in the deed was not ground upon which to set it aside, still, the absence of such power being, under the circumstances, a mistake, and the provision after death of the husband being without consideration, and the beneficiaries being volunteers, the grantor was entitled in equity to revoke the trust, and receive a reconveyance from the trustee: *Russell's Appeal*, 75 Pa. St. 269.

If a trust deed contains a power of revocation, the grantor may exercise the power, and this, by mortgage on the trust property, executed without reference, in terms, to the power: *Gaither v. Williams*, 57 Md. 625. Where a father and daughter, tenants, respectively, by the curtesy and in remainder in fee, and not in contemplation of the marriage of the daughter, join in a trust deed, with power during their joint lives to revoke the trust, and reconvey to new uses, and they subsequently annul the trust by deed of revocation, without declaring new uses, they thereby become reinvested with their former several estates: *Yard v. Pittsburgh etc. R. R. Co.*, 131 Pa. St. 205.

In *Carter v. Hough*, 86 Va. 668, a mother held judgments amounting to twenty thousand dollars against her son, and assigned part of them in trust for certain objects, the balance on such trusts as the son might appoint, or failing to appoint, then in trust to pay the interest to him, free from liens of any of his present creditors. The trustor reserved power to revoke the trust, and afterwards assigned the whole of the judgments to the son. It was de-

cided that this revoked the trust; that the judgments became the son's absolutely, and that the trust could not be interposed as against his creditors. A single woman, in contemplation of marriage, conveyed her estate to a trustee, to pay the income to her or to her designated agent, make sale at her request, and convey the trust property to her if she survived her husband, and in case of her death, to hold to the use of her testamentary appointees, and if she died intestate, to the use of her heirs at law. Thirty years after the trust took effect, and during the lifetime of the husband, she applied in equity to terminate the trust, and to have the trust estate reconveyed to her, and the court determined that as married women were sufficiently protected by existing statutes, she was entitled to the relief asked: *Nightingale v. Nightingale*, 13 R. I. 113.

LORD v. MEADVILLE WATER COMPANY.

[135 PENNSYLVANIA STATE, 122.]

SPRINGS, LAND-OWNER'S RIGHTS IN. — The owner of land upon which a spring is located which creates a stream of water accustomed to flow through the land of others has only the rights of a riparian owner, and cannot divert the water from its natural channel to supply the inhabitants of a city.

RIPIARIAN RIGHTS IN SPRINGS — TAKING WITHOUT COMPENSATION IS TRESPASS. — A corporation invested with the right of eminent domain may take a spring or stream of water issuing therefrom to supply a municipality; but it can only do so by making compensation to those who are deprived of their accustomed use of the water. A taking without compensation is a trespass, and the corporation so taking may be proceeded against as a trespasser.

PARTIES. — MARRIED WOMAN SUING ALONE FOR INJURY TO HER LAND is entitled to recover, notwithstanding her failure to prove title or possession in herself, when the husband's testimony is such as to estop him, if the real owner, from recovering for the same cause of action.

Pearson Church, for the appellant.

George F. Davenport, for the appellee.

PAXSON, C. J. We need not discuss the question presented by the second assignment, for the reason that an examination of the testimony shows conclusively that the jury did not give punitive damages. The verdict, forty-one dollars, is within the range of the undisputed testimony. The remaining assignments refer to the charge of the court and the answers to points. It is not essential to consider them separately. We can better dispose of them by giving our views generally upon the law of the case.

This was an action of trespass brought by Mrs. Lord, a married woman, against the Meadville Water Company, to recover damages for the diversion of a stream of water, which, before

the injury complained of, flowed over her land. The Meadville Water Company, appellant, was incorporated under the act of 1874, and, it was alleged, had the right of eminent domain for the purpose of supplying the city of Meadville with water. In order to aid in procuring such supply, the company, in the year 1888, purchased an acre of land near said city, on which was a flowing spring of water, and carried the water from said spring to the city by means of pipes. The plaintiff owns land near this spring, over which the water thereof was accustomed to flow prior to its diversion by the company. She claims that it no longer flows there, and that by reason of its being diverted out of its natural channel she is deprived of its use for irrigation and other purposes. This suit was brought to recover damages for such injury.

The questions thus presented are not difficult of solution. By the purchase of this acre of land on which the spring is situate, the company acquired the rights of a riparian owner; neither more nor less. What its rights as riparian owner are were sufficiently defined in the recent case of *Haupt's Appeal*, 125 Pa. St. 211, where it was said: "If the authority of the plaintiff were measured by its rights as riparian owner, it would be slender enough. It might, indeed, use the water for the domestic purposes incident to the said ten acres of land. If there was a tenant thereon, he could use it for watering his stock and for household purposes; for any useful, necessary, and proper purpose incident to the land itself, and essential to its enjoyment. But that the rights of a riparian owner would justify the plaintiff in carrying the water for miles out of its channel, to supply the borough of Ashland with water, is a proposition so palpably erroneous that it would be a waste of time to discuss it." So we say here. The purchase of the acre of land, including the spring, gave the company the rights of a riparian owner. But such rights were not a justification for the diversion of the water from its natural channel to supply the city of Meadville.

It was conceded upon the argument that the company had the right to divert it under its power of eminent domain. But it has never exercised such right. To do so involves compensation to those who are or may be injured by such diversion. Compensation was not made, nor security tendered. While a city or borough, or a company having the right of eminent domain, may take a spring or stream of water to supply a municipality, it can only do so by making compensation to those

who are deprived of the use of the water, as provided by the constitution. A taking without compensation is as trespass; as much so as the taking of land by a railroad company to construct its road without making compensation or filing a bond with security, as provided by law. Where the power to take exists, it must be exercised according to law. If it is not, the corporation so taking becomes a trespasser, and may be proceeded against as such. It is a mistake to assume that the purchase of this acre of land gave the company an absolute right to the spring of water. The water did not pass by the deed beyond its reasonable use by the vendee as a riparian owner. As was said in *Haupt's Appeal*, 125 Pa. St. 211: "There can be no such thing as ownership in flowing water; the riparian owner may use it as it flows; he may dip it up, and become the owner by confining it in barrels or tanks, but, so long as it flows, it is as free to all as the light and the air." The company might have taken this spring under its right of eminent domain, if it possessed such right; for aught that appears, it may do so still, and after having done so, and made compensation to the riparian owners who are injured thereby, it will be free from suits of this nature. Had it done so in this instance, it would not have had this judgment against it.

We do not regard the question of the plaintiff's title, under the facts of the case, as of any importance. The plaintiff's husband testified that the farm belonged to her, and he is certainly estopped from recovering damages in another suit.

Judgment affirmed.

SPRINGS — RIGHTS OF THE LAND-OWNER. — A spring which rises on a man's land, like the rain which falls upon it, belongs to him: *Note to Lybe's Appeal*, 51 Am. Rep. 549. But one on whose land a stream commences and flows through a well-defined channel, thence over and through the lands of others, cannot use all the water so as to deprive the other riparian owners of their rights therein: *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72, and note; *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788. There can be no question as to ownership when the water flows in no bed or channel: *Razzo v. Varni*, 81 Cal. 290. A spring from which no stream flows belongs to the owner of the land, and he may divert and use the water: *Bloodgood v. Ayers*, 108 N. Y. 400.

KIES v. CITY OF ERIE.

[136 PENNSYLVANIA STATE, 144.]

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENT ACT OF OFFICER. —

A city is not liable for the negligent act of its fireman in so opening the door to an engine-house as to strike and injure a pedestrian on the sidewalk.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTIVE BUILDINGS. —

Where a city has constructed an engine-house so that its doors swing outwardly by means of a spring attachment, to make them open easily, and when open they extend half-way across the sidewalk, it is not guilty of negligence in maintaining a defective building, or in failing to maintain its sidewalks in a reasonably safe condition, so as to make it liable to a traveler on the sidewalk who is injured by the opening of the doors.

ACTION to recover for personal injuries received from being struck by the door of an engine-house which was suddenly opened while plaintiff was walking on the sidewalk. Judgment on nonsuit, and plaintiff appealed.

W. Benson, C. L. Baker, and S. M. Brainerd, for the appellant.

Joseph P. O'Brien,* for the appellee.

PAXSON, C. J. We do not think the court below erred in refusing to take off the nonsuit. It has been held in numerous cases that a municipal corporation is not responsible for the acts of its policemen and firemen. In other words, the doctrine of *respondent superior* does not apply in such cases. It is sufficient to refer to *Knight v. City of Philadelphia*, 15 Week. Not. Cas. 307; and *Fire Insurance Patrol v. Boyd*, 120 Pa. St. 624; 6 Am. St. Rep. 745.

It was urged, however, that the injury of which the plaintiff complains was not the result of the negligence of the firemen, but of the manner in which the building was constructed. If this were so, it might present a different question. But the evidence does not sustain this allegation. It is true, the doors of the engine-house opened outwards, and were operated by springs, which, when certain bolts were pulled, opened, or assisted in opening, the doors. The case was argued upon the theory that when the bolts were pulled the springs opened the door suddenly, and with great violence. In such case, as they swept across a considerable portion of the pavement in opening, it can be readily seen that they might be a dangerous trap to injure persons passing along the said pavement. The only testimony on the part of the plaintiff upon this subject

was substantially as follows: "When the bolts are pulled you have to start the doors a little bit, and then the spring takes hold, and helps swing the door open. Sometimes they are opened quick, and sometimes not so quick. If the wind is blowing, it is difficult, and you have to follow the door, and push it along; and when there is no wind, they swing freely." As the plaintiff was nonsuited, she is entitled to all the deductions which can fairly be drawn from this evidence. Tested by this rule, however, it is not sufficient to justify a jury in finding that the doors of the engine-house were defectively constructed, and dangerous to citizens using the pavement. It is evident the only object and effect of the springs was to aid the firemen in swinging open the heavy doors. It is not only possible, but probable, that on the occasion referred to, if the door was opened violently and rapidly, as contended by the plaintiff, it was the result of a push by the person who opened it. For his carelessness or negligence, the city, under all the authorities, is not liable; and we have already said there was not sufficient evidence of the faulty construction of the building to submit to the jury. We would gladly help the plaintiff, but we can only do so at the expense of sound legal principles, which are of too much value to sacrifice to the hardship of a particular case.

Judgment affirmed.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF OFFICER. — The responsibility of a city for the torts and negligent acts of its officers is discussed in *Bulger v. Eden*, 82 Me. 352. A city required to keep its draw-bridge in good order, etc., is not liable for injuries occasioned to a traveler by being thrown into the water, through the negligence of the gateman or draw-tender: *Butterfield v. Boston*, 148 Mass. 544. See *O'Leary v. Board of Fire etc. Commissioners*, 79 Mich. 281; 19 Am. St. Rep. 169, and note.

CLARK v. SEARIGHT.

[185 PENNSYLVANIA STATE, 173.]

NEGOTIABLE INSTRUMENTS — INTEREST ON NOTE MADE IN ANOTHER STATE.

— A promissory note made and delivered in another state, and not made payable at any particular place, is payable in the state where made, and draws interest according to the laws of that state.

ACTION upon agreed facts to determine whether interest should be allowed upon a note executed in another state, and providing for interest at the rate of ten per cent per annum

from date. Judgment for plaintiff, the holder of the note, and defendant appealed.

M. C. Herman, for the appellant.

E. W. Biddle, for the appellee.

PER CURIAM. It appears by the case stated that the promissory note in controversy was made and delivered in the state of Iowa. It was therefore an Iowa contract. It is true, it was not made payable at any particular place; but, in the absence of any such stipulation, it was payable at the place where made. This is a well-settled rule of commercial law. It also appears by the case stated that the rate of interest, ten per cent, called for by the note, is lawful by the laws of that state. Under these circumstances it is plain that the *lex loci contractus* must govern, and the rate of interest is to be determined by the law of the place where the contract was to be executed.

An indorser is liable for interest on a protested bill of exchange according to the law of the place on which it is drawn: *Mullen v. Morris*, 2 Pa. St. 85. When a promissory note is made payable at a particular place, interest is allowed according to the law of the place appointed for payment: *Wood v. Kelso*, 27 Pa. St. 241. The rule is thus stated in 2 Edwards on Bills, section 1009: "The authorities are numerous to show the general rule to be that interest is to be paid according to the law of the place where the contract is made, unless the payment is to be made elsewhere, and then it is to be according to the law of the place where the contract is to be performed." The same rule is recognized by Chancellor Kent in his Commentaries, as well as by many other text-writers, while decisions to the same point might be cited almost without number. We need not refer to our act of 1858 in regard to interest, as it has no bearing upon contracts made and to be performed outside of the state.

Judgment affirmed.

NEGOTIABLE INSTRUMENTS — INTEREST — LEX LOCI CONTRACTUS — LEX FORI — Where a note in which no rate of interest is stated is executed and made payable in another state, the liability of the maker and the rate of interest must be governed by the laws of that state; but if the note is payable generally, no place of payment being agreed upon, the general rule is, that the *lex fori* governs in the collection thereof, as well as the rate of interest allowable as damages in the suit for collection: *Kopelke v. Kopelke*, 112 Ind. 435. But see *Bryant v. Edson*, 8 Vt. 325, 30 Am. Dec. 472, *Peck v. Hibbard*, 26 Vt. 698, 62 Am. Dec. 605, as to what law governs the enforcement of

notes made in other states, but payable generally, not at any particular place. Negotiable instruments, however, made payable by express agreement at a particular place are governed by the law of that place: *City of Aurora v. West*, 22 Ind. 88; 85 Am. Dec. 413, and note; *Mason v. Dousay*, 35 Ill. 424; 85 Am. Dec. 368; *Dunnigan v. Stevens*, 122 Ill. 396; 3 Am. St. Rep. 496.

COMMONWEALTH v. UNION LEAGUE OF PHILADELPHIA.

[185 PENNSYLVANIA STATE, 801.]

SOCIAL CLUB — POWER TO EXPEL MEMBERS. — A social club incorporated for social purposes, and owning property, and authorized by its charter to expel members for cause, may exercise the power of expulsion for a minor offense, so long as it acts in good faith, and exercises only the powers conferred by the charter.

SOCIAL CLUB — POWER TO EXPEL MEMBERS — LEGALITY OF BY-LAW. — An incorporated social club may regulate, through its by-laws, the causes for the expulsion of members and the manner of effecting the same, when such power is expressly conferred by its charter; and a by-law providing for the suspension of members guilty of conduct deemed by the board of directors disorderly, or injurious to or hostile to the objects of the club, and conferring on a suspended member the right of appeal, is valid.

SOCIAL CLUB — BY-LAWS, ASSENT TO. — One who has become a member of an incorporated social club will be deemed to have known and assented to the provisions of its charter and by-laws, which it was authorized to make, in reference to power of expulsion of members, and cannot object to the enforcement thereof on the ground that he is deprived of any legal or constitutional right.

SOCIAL CLUB — LEGALITY OF BY-LAW. — Where a social club is authorized by its charter to pass by-laws regulating the expulsion of members, such by-laws are legal, although they fail to designate and define specifically what acts are disorderly within the rule subjecting members to expulsion, and leave that question to be determined by the club's board of directors.

SOCIAL CLUB — POWER OF EXPULSION UNDER BY-LAW. — Where an authorized by-law of an incorporated social club provides that a majority of the directors may expel members for conduct which may by them be deemed disorderly, or injurious to or hostile to the interests of the club, a verdict of expulsion of a member will be sustained by a finding that, in violation of such by-law, he was guilty of rude and ungentlemanly conduct in the club-house, by charging a fellow-member, without provocation, with acting like a blackguard. It is not necessary to the validity of the conviction that the finding should be *in totidem verbis*, in accordance with the by-law.

SOCIAL CLUB — JUDGMENT OF EXPULSION BY, IS RES JUDICATA. — A judgment of expulsion of a member of a social club, after conviction under its charter and by-laws, in good faith and in a proper and legal manner, renders the case *res judicata*, and precludes its re-examination by a court of justice.

A. T. Freedley and Joseph B. Townsend, for the appellant.

John G. Johnson and Bernard Gilpin, for the appellee.

CLARK, J. This proceeding in the court below was a *mandamus*, brought by Arthur Burt, to compel the Union League of Philadelphia to reinstate him to membership in the league, from which he had been expelled. The petition was filed and the alternative writ issued on May 28, 1883, and on June 23d thereafter, the defendant's return was filed. The relator thereupon put in a plea traversing the return, but afterwards withdrew the plea, and filed a demurrer; all relevant matters contained in the return must necessarily, therefore, be deemed admitted and accepted as true. By the return it appears that the Union League of Philadelphia was incorporated on March 30, 1864, during the war of the Rebellion, "for the purpose of fostering and promoting the love of republican government, aiding in the preservation of the Union of the United States, and extending aid and relief to the soldiers and sailors of the army and navy thereof." By their charter the incorporators were entitled to perpetual succession, and were enabled to take and hold title to real and personal property, and to dispose of the same, "provided that the clear yearly value or income of all the estate and property of said corporation, including interest on all moneys by them lent, shall not exceed the sum of ten thousand dollars, exclusive of the real estate in the actual occupancy of the corporation." The officers of the league consist of a president, four vice-presidents, and fifteen directors, to be elected annually, who are authorized to choose and appoint from their own number a secretary and a treasurer.

The third section of the charter is as follows:—

"3. That the duties and rights of the members of the said corporation, the powers and functions of the officers thereof, the mode of supplying vacancies in office, the times of meeting of said corporation or its officers, the number which shall constitute a quorum thereof, respectively, at any such meetings, the mode of electing or admitting members, the terms of their admission, and the causes which justify their expulsion, and the manner of effecting the same, and the mode and manner in which the property of said corporation shall be divided and appropriated in case of a dissolution of said corporation or winding up of its affairs, shall be regulated by the by-laws and ordinances of said corporation, which they are empowered to make and alter in the manner which may be therein men-

tioned; provided, that the said by-laws and ordinances shall not be repugnant to or inconsistent with the constitution and laws of the United States or of this commonwealth."

The first section, article 1, of the by-laws, afterwards made in pursuance of the charter, provides as follows: "The members of the Union League of Philadelphia shall support the constitution of the United States, discountenance, by moral and social influences, all disloyalty to the federal government, encourage and maintain respect for its authority, compliance with its laws, and acquiescence in its measures for the enforcement thereof, and for the suppression of insurrection, treason, and rebellion, as duties obligatory upon every American citizen."

By the return, moreover, it appears that "although the purposes for which the corporate defendant was originally created were correctly set forth in the preamble to its said charter, yet the purposes of social intercourse entered as an element into its usefulness, and as the causes which led to its creation ceased to exist within little more than a year thereafter, the element of social intercourse increased; and although its members are, to a large extent, composed of persons of a certain political faith, as is the case with similar institutions in other cities of the world, yet a chief purpose of the institution is, and long has been, the promotion of social intercourse between the members themselves, and between the latter and the guests of the corporation, and to this end there was and is required the adoption of and strict compliance with certain rules of internal discipline regulating the intercourse within its walls."

To advance the purposes of the league, and to promote the social relations of its members, the league became the owner of valuable real estate, upon which is erected a club-house, which is maintained and governed according to certain rules and regulations contained in the by-laws promulgated under the third section of the charter.

The second section of the first article, in defining "the duties and rights of the members," provides that the members "shall have free access to the rooms and library of the league, subject to such rules and regulations as may be prescribed from time to time by the board of directors." The first, second, third, and fourth sections of the second article, defining "the powers and functions of the officers," provide that the board of directors shall consist of the president, vice-president,

and fifteen directors, elected annually, eight of their number to constitute a quorum; that this board of direction shall have power to appoint executive committees to carry into effect the objects expressed in the charter, and to prescribe their duties; to "exercise a general superintendence of the affairs of the league, with the control and management of its property and effects, . . . to make all rules for the management and regulation of the house, and the maintenance of good order therein, and to provide and enforce penalties for their infraction."

The fifth section of the same article is as follows: "A majority of the board shall have power to suspend members for a willful infraction of the rules of the house, or of any by-law of the league, or for acts or conduct which they may deem disorderly, or injurious to the interests or hostile to the objects of the league, but the offender may appeal from the sentence of suspension, as hereinafter provided; but prior to the suspension of a member, he shall be entitled to a notice and a hearing before the board, or before a committee of the same, as he may elect."

The fourth article provides for an appeal, and the trial thereof, as follows:—

"1. A member suspended from the league by sentence of the board of directors may appeal therefrom within thirty days after notice thereof posted on the notice-board, by filing with the secretary a written notice of his appeal, and the reasons therefor; in case of no appeal within the time limited, he shall then cease to be a member of the league.

"2. All appeals shall be tried in a meeting of the league, to be called for the purpose by the board of directors, within forty days after notice of the appeal shall be filed with the secretary.

"3. The president, or one of the vice-presidents, shall preside at such meetings, and the cause of suspension shall be reported in writing by the board of directors, with a statement of facts on which their sentence was founded, a copy of which shall be furnished to the appellant on his application, to be made to the secretary at least ten days before the meeting. The appellant shall then present his defense in writing, to which one member of the board may reply orally. The appellant, or any one member in his behalf, may then rejoin, and a director may a second time speak in support of the charge, and no further discussion shall be allowed. The presiding officer shall then put the question, 'Shall the sentence

of the board of managers in this case be affirmed?" If a majority of the meeting shall vote in the affirmative, the sentence shall stand as the final judgment of the league, and the appellant shall thereupon forfeit all the rights and privileges of membership. If less than a majority of the meeting vote in the affirmative, then the sentence of the board shall be reversed, and the appellant shall thereupon be restored to membership."

By the fifth section of article 1, it is provided that "when a person shall cease to be a member, from any cause, all the interest he may have in the property of the league by reason of his membership shall be vested in the corporation."

The penalty in case of conviction of an offense under the fifth section of the by-laws, it will be observed, is, practically, expulsion; the suspension from the privileges of the league is only during the pendency of proceedings, upon conviction by the board, before and after appeal. If no appeal be taken within the time specified, or if one be taken and not sustained, expulsion follows. Suspension indicates merely the *status* of the member after conviction by the board, pending the time for taking and trial of the appeal. The sentence of the league cannot, therefore, in any proper sense, be said to enlarge the judgment, as intimated by the learned judge of the court below.

We have quoted extensively from the charter to show that the power of expulsion was expressly conferred upon the corporation by the charter, with the right to regulate the causes which would justify the exercise of that power, and to define the mode or manner of its exercise; and even more extensively from the by-laws, to exhibit the rules and regulations which were made in pursuance of the charter for the government of the league and for the trial and expulsion of members offending against them, in order that we may, in the further consideration of the case, see whether or not these by-laws in any way conflict with the charter, or with the constitution or laws, federal or state.

On May 3, 1870, as we learn from the defendant's return, the relator was elected a member of the league, and on May 7th signed the book of membership, which contained a copy of the charter and by-laws. On December 30, 1882, a formal charge was preferred against him by Mr. William E. Littleton, a fellow-member, to the effect that the relator was guilty of "conduct unbecoming a gentleman and a member of the

league," specifying more particularly that on the Friday preceding, in the restaurant of the league, the relator had used grossly insulting language to the complainant, and that, under the circumstances, the complainant had no recourse but to report the facts to the league. Whereupon, at a meeting of the board of directors on the 9th of January, 1883, the house committee reported the relator for action, under article 2, section 5, of the by-laws, and moved that notice be sent to Mr. Burt in accordance therewith; and in the event that Mr. Burt should choose to be tried by a committee, the president was authorized to appoint a committee, not exceeding five, to hear the case and report to the board, which was agreed to. The relator, having been duly notified, elected to be heard by a committee, and the president thereupon appointed Messrs. E. N. Benson, William C. Houston, Samuel C. Perkins, and Edwin H. Fidler, the four vice-presidents, to hear the case. That committee met at the league on the evenings of January 16th and January 24th, on both of which occasions Mr. Burt was present, and witnesses were examined. A counter-charge of the use of offensive language by Mr. Littleton, as a provocation for Mr. Burt's conduct, having been filed, and an intimation given that Mr. Littleton was under the influence of liquor at the time of the interview between them, witnesses were called and examined upon that question also. At a meeting of the board of directors held on February 13, 1883, the committee reported that they were satisfied they had seen and heard every one who could throw any light on the occurrence which led to the report of the house committee, and that they found the following facts:—

"1. That on December 9, 1882, Arthur Burt, in the restaurant of the league, was guilty of rude and ungentlemanly conduct, and told a fellow-member, William E. Littleton, that he was acting like a blackguard.

"2. That the offense was without provocation on the part of Mr. Littleton.

"3. That Mr. Littleton was not at the time under the influence of liquor."

The committee submitted the following resolution:—

"Resolved, that Arthur Burt has been guilty of a violation of article 2, section 5, of the by-laws of the Union League, and that he be and is hereby suspended, from this date, from the privileges of a member."

Whereupon, on motion, the report was accepted by the board, and the resolution adopted.

On March 13, 1883, the relator entered and gave notice of an appeal, assigning the following reasons in support of it: —

“1. That the testimony produced at the hearing in the matter before the committee does not show any sufficient cause for the sentence or suspension imposed by the board.

“2. That the offense for which said sentence of suspension was imposed was of such a trifling nature that the punishment by suspension is an unnecessarily harsh and severe one.”

A special meeting of the league was thereupon called, upon due and proper notice, for trial of this appeal on April 3, 1883, the trial to be conducted under article 4 of the by-laws. There were present at this meeting 279 persons, which was a quorum, the president, George H. Boker, in the chair, and the trial was proceeded with. The statement of the board, in writing, setting forth the facts as found by the committee, and the action of the board of directors thereon, was first read. In this statement, the board set forth that the counter-charge against Mr. Littleton, having been found to be wholly unwarranted, was deemed an aggravation of the relator's offense; and that the further fact that the relator had on a previous occasion been suspended for a very gross offense of a similar character (which is fully set forth in the return), and had only been reinstated upon promise of amendment and a pledge that there would be no further cause of complaint, was a matter which entered into the consideration of the board in inflicting the sentence of expulsion.

The relator's statement in writing was then read. No witnesses were called; neither of the parties appear to have expressed any desire to that effect; the appeal was submitted upon the facts found by the committee. Mr. Pettit addressed the meeting on behalf of the board; Mr. McVeigh, in behalf of Mr. Burt, and Mr. Perkins, closed the discussion. The president then put the question: “Shall the sentence of the board of managers, in this case, be affirmed?” The result of the vote was 146 ayes, and 75 noes; members present, 279. A majority of those present having voted in the affirmative, the president announced that the appeal was not sustained, and that Mr. Arthur Burt ceased to be a member of the Union League.

We give this statement of the relator's arraignment, trial, and conviction from the defendant's return, where the facts,

we think, are stated, not argumentatively, inferentially, or evasively, but with fair and reasonable certainty. The cause of the relator's disfranchisement, and the proceedings by which it was effected, are distinctly and clearly set forth. It is true, the relator does not appear to have been found guilty of "acts or conduct" which by the board were "deemed disorderly," or "injurious to the interests or hostile to the objects of the league," *in totidem verbis*; he was found guilty of rude and ungentlemanly conduct, in the league-house, in this: that without cause or provocation he charged upon a fellow-member that he was acting like a blackguard. This was certainly conduct of a disorderly character, especially as it occurred within the club-house, a place devoted to the cultivation of friendly, political, and social relations between gentlemen, and might well be deemed disorderly by the board of directors; that the board did deem the act disorderly, and injurious to the interests and hostile to the objects of the league, is shown by their formal resolution to that effect.

It is not expected that the proceedings of a trial of this character, which are conducted in most cases by persons unlearned in the law, will be expressed with absolute technical accuracy, or will be subjected to the severe scrutiny which is applied by persons of critical professional skill in courts of law. If the proceedings are regular, and conducted in good faith, if the accused has been accorded a full and fair hearing, and a proper finding and judgment has been entered upon the facts, and the whole proceeding is stated with substantial accuracy, it is sufficient. The trial seems to have conducted in an orderly manner, according to the strict letter of the by-laws of the league. The proceedings are in due form, and the relator, for anything that appears, was allowed the benefit of a full and impartial hearing, before a committee of the board, at his own election; it does not appear that he was denied any right or privilege to which he was entitled. There is no allegation, much less evidence, of fraud or unfairness, and we assume that the action of the league was in good faith.

The only question, as we understand the case, is one of power. Was the league duly and legally authorized by the by-laws to expel the relator from membership for the offense charged, and of which he was convicted? The case of *Evans v. Philadelphia Club*, 50 Pa. St. 107, bears no analogy in principle to the case in hand. In that case there was no express

power of expulsion conferred in the charter, and the decision rested wholly upon the ground that the offense was not such as fell within the inherent powers of the corporation at common law. The common-law power of expulsion, as declared in the opinion of Chief Justice Woodward, who tried the case at *nisi prius*, may be stated thus: —

1. The power of disfranchisement must, in general, be conferred by the charter. It is not sustained as an incidental power, excepting, — 1. When the member has been legally convicted of an infamous offense; or 2. When he has committed some act tending to the destruction or injury of the society.

2. The power to make by-laws is incidental to corporations, but is generally conferred by charter; by-laws, however, which vest in a majority the power of expulsion for minor offenses are void, and expulsion under them will not be sustained.

3. In joint-stock companies, or corporations owning property, no power of expulsion can be exercised, unless conferred by statute.

On error to this court, these rulings at *nisi prius* were affirmed by a divided court. Evans had been convicted of breaking the sixty-fifth article of the by-laws of the club, by having an altercation within the walls of the club-house with Samuel B. Thomas, and by striking him a blow. "I look upon the occurrence," says the chief justice, "as disorderly, and injurious to the interests of the club, within the meaning of the sixty-fifth by-law, but as one of those 'minor offenses' . . . for which a majority have no power, even under the by-laws, to disfranchise a member; and upon the doctrine of the cases I have referred to, I hold the by-law void, so far as it inflicts this extreme penalty for such an offense. I would be very sorry to say that anything short of a statute could confer on a majority of the members of any corporation power to expel a fellow-member for merely disorderly conduct. . . . It is not a joint-stock company at present, for under its by-laws no pecuniary profits are divisible among the members, but it may become so; and whether it does or not, the relator has a vested interest in its estate, and cannot be deprived of it by the proceedings that were had against him. On this point the authorities are clear, and without conflict. Nothing but an express power in the charter can authorize a money corporation to throw overboard one of its members. I have shown that the act of incorporation contained no such

power. On the contrary, it excluded it; for the proviso reads 'that nothing herein contained shall be so construed as to authorize said Philadelphia Association and Reading-room to do any other act or acts, in their corporate capacity, than are herein expressed.' " These excerpts, drawn from the opinion of the chief justice, show that while he denied the common-law power of a corporation to disfranchise its members, with the exceptions stated, he conceded that where the power is conferred by the charter, it may be exercised even for minor offenses, and in money corporations.

The Union League, although not a proprietary corporation, cannot in any strict sense be considered a joint-stock or moneyed corporation; its objects and purposes, as well as its management, are of a purely patriotic and social and not of a financial or monetary character. Although authorized to hold property, real and personal, to a certain limited extent, for the promotion of the objects of the league, it is plainly distinguishable from such corporations as are organized for business and for purposes of gain, and this is fully illustrated in the present conduct of its affairs. In the by-laws it is provided "that no member shall receive any profit, salary, or emolument from the funds of the league." Members are admitted, not upon payment of the estimated value of a share or interest in the property of the league, but of a merely nominal sum as an admittance fee, and are charged with the payment of an annual tax of twenty-five dollars for the support of the league, whilst their franchise and property rights are not inheritable, but continue for life, or during membership only. But however this may be, the power of expulsion is expressly conferred by the charter, and the causes which shall justify it, and the manner of effecting the same, are expressly committed to the corporation, to be regulated by the by-laws, which by-laws "the corporation and its officers are empowered to make and alter in the manner therein mentioned." It is plain, also, that, according to the by-laws made under this provision of the charter, a majority of the board of directors has the power to suspend a member for acts or conduct which they may deem disorderly, or injurious to the interests or hostile to the objects of the league, "and this suspension, unless the member is subsequently restored, is equivalent to an expulsion."

It is contended, however, that this provision of the charter, and of the by-laws, is illegal and void, inasmuch as the per-

sonal franchise and property rights of each individual member is subject to the action of a majority. We cannot see, nor has it been suggested, how this section of the charter can be said to be in conflict with the constitution of the state or of the United States; and if it is not, it is more difficult to see how that may be said to be unlawful which the law-making power of the state has expressly declared to be lawful. The relator, at the time of his admission to the league, was bound to know the provisions of the charter, and will be held to have assented to its provisions and to the frame of government which was lawfully set up in accordance therewith. By the terms of his admission, the relator voluntarily submitted himself in all matters pertaining to the government of the league to the action of the board, and of the majority; and he could not thereby have been deprived of any constitutional or legal right, for the tribunal was practically one of his own selection. In the case of *Butchers' Beneficial Association*, 35 Pa. St. 151, and 38 Pa. St. 298, and *Beneficial Association*, 38 Pa. St. 299, applications for charters under the act of 1833 were refused by this court, for the reason that the provisions of their proposed charters gave entirely indefinite powers over its members, and as this was supposed to be incompatible with the spirit of our institutions, the charters were refused; but if they had been granted, no one can doubt that the powers conferred, if exercised in a reasonable manner, and not arbitrarily or capriciously, would have been sustained. Here, however, we have a legislative charter accepted and acted upon; the powers of the corporation have vested, and it only remains for us to inquire whether these powers have been exercised in a proper and legal manner.

The case bears a closer analogy to *Society etc. v. Commonwealth*, 52 Pa. St. 125, 91 Am. Dec. 139, where the corporation held a charter under the act of 1791, in which the general power of expulsion was conferred, with the right to enact by-laws, and to alter, amend, and repeal the same. The objects of the society were, in case of sickness of a member, to visit and to console him, and to give him advice and assistance; in case of death, to bury him, free of charge; and to assist the families of deceased members, according to the circumstances and available means of the society. The relator, Meyer, was convicted of "feigning himself sick without being so," and of "drawing relief after his recovery," which were offenses declared by the by-laws. It was held that the society had a

clear right, under the charter, to pass sentence of expulsion for violation of the by-laws, and by reason of the nature of the offense, a like power at the common law. Speaking of the force and effect of the charter, Mr. Justice Agnew says: "Having the force and effect of law, by the provisions of the act allowing the incorporation, it . . . is no longer a subject of judicial inquiry as to the fitness of its objects, conditions, and articles."

In *Franklin Benef. Ass'n v. Commonwealth*, 10 Pa. St. 357, the society was organized under the act of 1791 for mutual assistance in sickness, etc.; and in order to provide against extraordinary perils, a by-law prohibited members from enlisting as soldiers in the army, and, notwithstanding the general and manifest impolicy of such a provision, it was said that in a proper case it might be sustained; such an objection, the court said, would go to the legal existence of the association; if the articles were against the public policy, it belonged to the court, in the first instance, to withhold the certificate. And as the legislature, by a direct statute constituting the charter of the Union League, has expressly given to the members themselves the right, through their by-laws, to regulate the causes of expulsion and the manner of effecting the same, we cannot see why the right thus conferred may not be exercised. The wisdom or policy of the provision having been determined by the legislature, it is not now the subject of judicial inquiry.

Nor, in view of the very general and comprehensive powers thus conferred, and of the objects and purposes, conduct and management, of the league, can we say that the by-laws, ordained pursuant to the charter, are unreasonable, arbitrary, or oppressive, or that they violate any principle of natural justice. We see nothing unreasonable in a by-law of a club consisting of gentlemen who are associated for patriotic and social purposes requiring the observance of a proper decorum and gentlemanly personal intercourse between the members whilst within the walls of the club-house; the lack of such regulations would certainly tend to promote such disorder and dissension as would be fatal to the attainment of the objects of the association. Any vilification of a member, or exhibition of personal rancor towards him, or the use of abusive or offensive epithets respecting him, especially in his presence and hearing, within the club-house, is, without doubt, disorderly.

and injurious to the interests of the club. Nor is the by-law in question illegal, or in conflict with the charter, in this, that it does not designate and define the various and specific acts which will be deemed disorderly. To have anticipated in a by-law the various disorderly acts which might or could occur would have required the exercise of a very fertile imagination; neither the statute nor the common law contains any such ridiculous detail. What is orderly and what is disorderly conduct injurious to the interests and hostile to the objects of the league must necessarily be determined by some proper tribunal; and the board of directors, to whom the practical management of its affairs is given, constitutes, in the first instance, the tribunal which the members have themselves set up to have and exercise jurisdiction over such offenses. When Mr. Burt became a member of the league, he voluntarily submitted himself to this jurisdiction; he was admitted upon the terms of the charter, with knowledge that he must submit to all such regulations as the by-laws might reasonably provide, and that for any willful violation or infraction thereof he was liable to be disfranchised.

The offense of which he was convicted, it is true, was a minor offense; not such as would have justified his expulsion at the common law, but such as justified the league, acting in good faith, in the exercise of the powers conferred by the charter, in imposing that sentence; and especially as the relator, on a previous occasion, had been suspended for an offense of a similar character, and was reinstated upon his promise of amendment and his pledge that there would be no further cause of complaint. Nor is it wholly without significance that the counter-charge against Mr. Littleton was wholly groundless, unwarranted, and untrue. It does not appear that the board of directors, nor the league, in the exercise of their powers, either in the framing of these by-laws or in the trial and conviction of the defendant, acted arbitrarily or oppressively, or in any sense unjustly, or that Arthur Burt was disfranchised without cause.

The league in the trial of this cause acted as a judicial tribunal; the offense charged, although a minor offense, was such as brought the relator within the jurisdiction; the trial was conducted in good faith and in due form, and the relator was convicted and sentenced in accordance with the law of the league, which we have said was in conformity with the charter.

We may judge of the cause of the expulsion and of the form of the proceedings: *Commonwealth v. German Soc.*, 15 Pa. St. 451; but we cannot review the case on its merits.

The relator's guilt of the offense charged is *res judicata*. The courts entertain jurisdiction to keep these tribunals in the line of order, and to correct abuses, but they do not inquire into the merits of what has passed in *rem judicatam*, in a regular course of proceeding: *Commonwealth v. Pike Benef. Soc.*, 8 Watts & S. 247; *Toram v. Howard Benef. Association*, 4 Pa. St. 519. In *Black etc. Society v. Vandyke*, 2 Whart. 312, 30 Am. Dec. 263, Chief Justice Gibson asserted that the by-laws of a private corporation like the present derived their force from assent either actual or constructive, and the party assenting to the charter is consequently bound by everything done in accordance with it; and when he has been regularly tried and expelled, the sentence of the society, acting in a judicial capacity and within its jurisdiction, is not to be questioned collaterally, whilst unreversed by superior authority. If he have been expelled irregularly, the chief justice adds, "he has his remedy by *mandamus* to restore him, but neither by *mandamus* nor action can the merits of his expulsion be re-examined." We quote from the opinion of Mr. Justice Agnew in *Society etc. v. Commonwealth*, 52 Pa. 125, 91 Am. Dec. 139, where the case in 2 Wharton, 312, is followed, and the same rule is recognized and approved. No case has been called to our attention in which a different rule is laid down.

We have made no reference to the English cases cited at the argument; the English clubs are not incorporated; they are formed under written articles of agreement, and the rules of law applicable thereto are somewhat different, for there the members are held upon the footing of a personal contract; whereas, in the case of a corporation, as we have already said, the courts will see that the powers conferred, and especially the power of expulsion, are not exercised in an oppressive or arbitrary manner, but in good faith and upon reasonable cause. We have confined our citations to our own cases, which, however, do not differ in any material respect from the cases elsewhere. One case has been brought to our attention, *Pitcher v. Board of Trade*, 20 Ill. App. 319, which appears to bear a very close analogy to the present. The board of trade was a body corporate created by a special act of the legislature; it owned a large amount of property; its object was the promotion of trade, and the admission fee was ten thousand dollars.

The corporation was authorized to establish such rules, regulations, and by-laws for the management of their business and the mode in which it should be transacted as they might think proper, and had "the right to admit or expel such persons as they may see fit, in a manner to be prescribed by the rules, regulations, and by-laws thereof." Pitcher was admitted as a member, and paid the price of admission, but was afterwards charged with "fraudulent conduct in a business transaction," an offense declared by the by-laws; he was tried before the board of directors under the by-laws, and the charge being sustained, he was expelled. On a *mandamus*, it was held that as the charter conferred a general power of expulsion to be exercised as prescribed by the rules, regulations, and by-laws, that power was such as could be delegated to the board of directors. "It seems to us," says Judge McAllister, who delivered the opinion, "from a consideration of all the provisions of the act, that its framers intended to leave the whole subject-matter of the expulsion of members to be regulated, both as to method and tribunal, by rules and by-laws of the body, not inconsistent with the principles of natural justice or the laws of the land. In pursuance of that power, the by-laws, set out in our statement of the case, were adopted, by which appellant on admission formally agreed to be bound. We are of opinion that such by-laws were authorized by the act, are not inconsistent with any principle of natural justice or the laws of the land, and are valid; that the trial, conviction, and expulsion of appellant were by a tribunal not only authorized by appellee's charter, but by reason of appellant agreeing to be bound by said by-laws." The case cited presents many points of similarity to the present case. The corporations, in both cases, owned property of large value; members were admitted on payment of a money consideration; the power of expulsion was in both instances conferred by charter, and was delegated under the by-laws to the board of direction, not only as to the causes, but as to the manner of its exercise; and in neither case was the particular act or thing charged specifically set forth as an offense in the by-laws, but was, on the trial, so adjudged by the board of directors.

We are of opinion, after a careful examination of the whole case, that the learned court below erred in entering judgment for the plaintiff upon the demurrer.

The judgment is therefore reversed, and judgment is now entered for the defendant.

CORPORATIONS AND UNINCORPORATED SOCIETIES. — POWERS OF DISFRANCHISING AND EXPELLING THEIR MEMBERS: See extended note to *Hiss v. Bartlett*, 63 Am. Dec. 773-778; note to *Austin v. Searing*, 69 Am. Dec. 677, 678; *Gregg v. Massachusetts M. Soc.*, 111 Mass. 185; 15 Am. Rep. 24, and note 27, 28. A mandamus will not lie to compel the officers of a benefit society to reinstate an expelled member: *Schmidt v. Abraham Lincoln Lodge*, 84 Ky. 490. The expulsion of a member of an unincorporated society for an offense which under the by-laws is punishable by fine only is invalid: *Otto v. Tailors' etc. Union*, 75 Cal. 309. Compare *McKune v. Adams*, 123 N. Y. 609; ante, page 785.

BRIEGEL v. CITY OF PHILADELPHIA.

[135 PENNSYLVANIA STATE, 451.]

MUNICIPAL CORPORATIONS — LIABILITY FOR NUISANCE. — A city is liable in damages for maintaining a defectively constructed privy-well upon its property used for school purposes, and which creates a nuisance to the injury of adjoining owners.

MUNICIPAL CORPORATIONS — LIABILITY FOR NUISANCE. — A municipal corporation owning and occupying property for public purposes is as much subject as a private person to the rule that it must so use its own property as not to injure that of another, and is therefore liable to an adjoining owner for injuries from a nuisance maintained by it upon its property.

TRESPASS to recover for injuries to dwelling-houses caused by the negligence of the city in defectively constructing the plumbing and drainage connected with the privy-well of a public-school building, owned and maintained by the city upon its property. Judgment for plaintiff, and defendant appealed.

Leonard Finletter and Charles F. Warwick, for the appellant.

William W. Porter, for the appellee.

MITCHELL, J. The first six specifications of error are to the findings of fact and the assessment of damages, but the report of the referee having been confirmed by the court, and no plain mistake being shown, we dismiss them without discussion.

But the learned counsel for the city have made an urgent and ingenious effort to bring this case within the ruling in *Ford v. Kendall School Dist.*, 121 Pa. St. 543. The distinction, however, is plain. That case was an action for the negligence of the janitor of a school building, and was decided on the ground that, under the Pennsylvania statutes, school districts are agencies of the commonwealth for a special and limited purpose, with no funds under their control but public moneys devoted to a specific charity, and not divertible, even indi-

rectly, to any other use. This purpose might be entirely destroyed by holding the funds liable for the consequences of torts by the officers or servants of the school district, and therefore such liability cannot be sustained. It had been held as early as *Wharton v. School Dist.*, 42 Pa. St. 358, that school districts are not municipalities, but mere territorial divisions for limited purposes, and belonging to the class of *quasi* corporations which exercise some of the functions of a municipality within a prescribed sphere. To the same effect are *Commonwealth v. Beamish*, 81 Pa. St. 389; *Colvin v. Beaver*, 94 Pa. St. 388; *Erie School Dist. v. Fuess*, 98 Pa. St. 600. And this is the well-settled general doctrine. "It is essential to bear in mind the distinction between municipal corporations proper and *quasi* corporations, such as townships, school districts. . . . The decisions hold the former class of corporations to a much more extended liability than the latter, even where the latter are invested with corporate capacity, and with the power of taxation": 2 Dillon on Municipal Corporations, 3d ed., sec. 961.

The present action differs from the class we have been considering, in being against the city of Philadelphia, and in being an action for nuisance by the negligent use of property. The city, having a general power of taxation, and exercising full municipal functions, comes under the larger measure of liability spoken of by Judge Dillon. Just how far this liability extends has not been definitely decided, as is said by our brother Clark in *Boyd v. Insurance Patrol*, 113 Pa. St. 269, 279, where he reviews the cases with special reference to the liabilities of charitable or other corporations exercising a *quasi* municipal function. Nor is the distinction between the cases where municipal corporations have been held liable, and where they have not, entirely logical or obvious, as was observed by Chief Justice Gordon in *Ford v. Kendall School Dist.*, 121 Pa. St. 543, 549. But in the class of cases to which the present belongs, injuries arising from the misuse of land, there has never been any substantial hesitation in holding cities liable. The ownership of property entails certain burdens, one of which is the obligation of care that it shall not injure others in their property or persons, by unlawful use or neglect. This obligation rests, without regard to personal disabilities, on all owners alike, infants, *femes covert*, and others, by virtue of their ownership, and municipal corporations are not exempt. The general rule is thus stated: "Municipal corporations are

liable for the improper management and use of their property, to the same extent and in the same manner as private corporations and natural persons. Unless acting under valid special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another": 2 Dillon on Municipal Corporations, 3d ed., sec. 985. The particular question here involved does not seem to have been before this court, but it was expressly decided in *Shuter v. Philadelphia*, 3 Phila. 228, by Judge Sharswood, when president of the district court: "The municipal corporation owning and occupying property for public purposes is as much subject as a private citizen to the usual rule, *Sic utere tuo ut alienum non lædas*. The city is as much bound as an individual owner of a lot to find an outlet for the water on it, without encroaching on his neighbor." We adopt this as a correct exposition of the law.

Judgment affirmed.

MUNICIPAL CORPORATIONS — NUISANCES. — As to the liability of a city for creating or maintaining a nuisance, see *City of Fort Worth v. Crawford*, 74 Tex. 404; 15 Am. St. Rep. 840, and note 845-849.

MILLER v. GETZ.

[185 PENNSYLVANIA STATE, 553.]

EXECUTIONS — PRIORITY BETWEEN. — An execution issued in good faith, to take property for the purposes of sale, and not merely to create a lien, will not be postponed simply because the goods were permitted by the officer to be sold under a subsequent execution.

EXECUTIONS — ABANDONMENT OF LEVY OF. — A constable's levy is not abandoned merely because he gives his execution to a sheriff, who makes a subsequent levy, subject to that made by the constable, on the same goods, and then sells them.

EXECUTIONS — LEVY ON EXEMPT PROPERTY — APPLICATION OF PROCEEDS. — The proceeds of exempt property levied upon to satisfy a judgment containing no waiver of exemptions, and afterwards levied upon and sold under a judgment containing such waiver, will be applied to the payment of the first judgment, under the rule that a waiver as to any lien will inure to the benefit of all prior liens.

ACTION to enforce the proper distribution of a fund paid into court as the proceeds of a sale of the goods of J. G. Getz, under execution. In May, 1886, S. H. Miller obtained a judgment against said Getz for one thousand dollars, upon a bond containing a waiver of exemption, and in April, 1889,

this judgment was assigned to one Sophia Erb. In May, 1888, R. A. Leinbach recovered judgment against said Getz for \$269.97, and an execution issued thereon to Constable Dern, returnable June 12, 1888. On May 24, 1888, Dern levied on goods of Getz, which had been set aside to him as exempt under an assignment for the benefit of creditors executed April 23, 1888. Getz made a formal claim to the property, under his exemption benefit. A few hours later on the same day, an execution was issued and levied under the judgment in *Miller v. Getz*. The sheriff's return was as follows: "May 26, 1888. Levied on defendant's real estate, and served notice of condemnation; same day, levied on defendant's personal property subject to constable's levy; and June 4, 1888, sold personal property for \$306.12; deduct costs, \$20.38, — \$285.74." The personal property levied upon and sold by the sheriff was the same levied upon by the constable, who, being told that there was an execution in the hands of the sheriff, went to his office, and handed him his execution, at the same time claiming his rights as an officer to the goods subject to the sale by the sheriff. Upon the facts and against the auditor's report, the court ordered that the \$285.74 be paid in satisfaction of Leinbach's judgment against Getz, and Miller appealed.

William R. Wilson, for the appellant.

A. J. Eberly, for the appellee.

PER CURIAM. The law is well settled that an execution issued for the purpose of obtaining a lien, and not to sell the goods, will be postponed to a subsequent *fieri facias*, under which the officer having the writ in charge proceeds to levy and sell: *Corlies v. Stanbridge*, 5 Rawle, 286; *Mentz v. Hamman*, 5 Whart. 150; 34 Am. Dec. 546; *Dorrance v. Commonwealth*, 13 Pa. St. 160; *Freeburger's Appeal*, 40 Pa. St. 244; *Stern's Appeal*, 64 Pa. St. 447; *Landis v. Evans*, 113 Pa. St. 332. There was nothing in this case to show that the execution of Reuben A. Leinbach was not issued in entire good faith, for the purpose of making the money. The constable made a levy thereunder, and upon the same day, but a few hours later, a levy was made by the sheriff, upon the same property, upon another execution. Thereupon the constable handed over his levy to the sheriff, at the same time claiming his rights as an officer to the goods, and allowed the sheriff to sell. The sheriff returned his writ subject to the constable's levy, and the proceeds of the sale, \$285.74, were distributed by

the court below to the plaintiff in the execution in the hands of the constable. We see no error in this. It is true, the auditor found that the constable abandoned his levy. This, however, is a mere deduction from evidence which does not justify it, and the court was clearly right in not regarding it. It was contended, however, that the money should have been awarded to the Miller judgment, because it contained a waiver of exemption, while none is found in the Leinbach judgment. This position cannot be sustained. It is settled that a waiver as to any lien will inure to the benefit of all prior liens, on the principle that a debtor cannot alter the precedence settled by law: *Hallman v. Hallman*, 124 Pa. St. 347.

The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

EXECUTIONS — PRIORITY AMONG RIVAL EXECUTIONS. — Holders of junior executions cannot gain preference over senior executions duly levied, by obtaining possession of the goods levied on, or by purchasing previous executions, or by being the first to take steps to set aside a fraudulent assignment of the debtor's property: *Leach v. Pine*, 41 Ill. 65; 89 Am. Dec. 375. An execution first tested takes priority over one of junior teste, first delivered and levied, where the former comes into the sheriff's hands before a sale of the property: *Green v. Johnson*, 2 Hawks, 309; 11 Am. Dec. 763, and note. Compare *Million v. Commonwealth*, 1 B. Mon. 310; 36 Am. Dec. 580, and note.

EXEMPTION — WAIVER. — When an exemption is waived, the property must be distributed according to priority: *Garrett's Appeal*, 32 Pa. St. 160; 72 Am. Dec. 779. For the right of waiver cannot be exercised so as to create a preference: *Collins etc. Co.'s Appeal*, 35 Pa. St. 87; as in favor of a junior lien creditor: *Shermer's Appeal*, 44 Pa. St. 396.

KING v. FRICK.

[125 PENNSYLVANIA STATE, 575.]

WILLS — CONSTRUCTION. — Where a will contains an absolute devise to a devisee, with a provision that if the latter "should die without children, grandchildren, or wife living," then to others, these words, in the absence of a contrary intent appearing from the face of the will, refer to the death of the devisee during the lifetime of the testator, and if the devisee survives him, he takes an estate in fee.

Smyser Williams and R. E. Cochran, for the appellant.

A. C. Fulton, for the appellee.

Per CURIAM. We think the court below correctly held that the plaintiff, Harry B. King, took a fee in the real estate devised

to him by E. A. King, his father. The language of said will, over which the present contention arises, is as follows: "All my estate, real, personal, and mixed, not bequeathed or devised to my said wife, as aforesaid, I give, devise, and bequeath to my said son, Harry B. King, and to his heirs and assigns forever, subject to the events and conditions aforesaid. If my son should die without children, grandchildren, or wife living, then his portion of his estate under this will, and any increase thereof, I bequeath and devise as follows: One half thereof to my wife in fee and absolutely, and the remaining half to the next of my kindred in fee and absolutely."

We think it plain, under the authorities, that the words "die without children, grandchildren, or wife living" refer to the death of his son during the lifetime of the testator. As was said by Justice Sharswood in *Mickley's Appeal*, 92 Pa. St. 514: "The first taker is always the first object of the testator's bounty; and his absolute estate is not to be cut down to an estate for life, or, what is practically the same thing, to be subjected to an executory gift over, upon the occurrence of the contingency of death, or death without issue, at any future period within the rule against perpetuities, without clear evidence of such an intent"; citing a number of authorities. No such intent appears upon the face of this will. On the contrary, we think the intent of the testator is clear, that if his son survived him, he should take a fee.

Judgment affirmed.

WILLS — CONSTRUCTION. — In the absence of a clearly manifested intention upon the part of the testator to postpone to an uncertain and possibly distant time after his death the vesting of his estate in his children, the law prefers and presumes that he intended that it should vest at the moment when the will shall become operative: *Johnes v. Beers*, 57 Conn. 295; 14 Am. St. Rep. 101. If a devise is made absolute in the first instance, and it is provided that in event of death, or death without issue, another should be substituted as devisee, it shall be construed to mean death, or death without issue, before the death of the testator himself: *Stevenson v. Fox*, 125 Pa. St. 568; 11 Am. St. Rep. 922, and note. Compare extended note to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 100-107.

BUCKNOR'S ESTATE.

[136 PENNSYLVANIA STATE, 23.]

NOTE OF MARRIED DAUGHTER CHARGEABLE AGAINST HER SHARE OF HER MOTHER'S ESTATE WHEN. — Where a married woman, while incapacitated by her coverture from contracting a loan of money, borrows money from her mother, giving her promissory note therefor, and the mother afterwards dies intestate, and the daughter repudiates her note, the orphans' court in distributing the estate should charge the amount of the note against the share of the daughter. The daughter, though not technically a bailee of the money for the estate, is bound in equity and good conscience to return it, and the orphans' court, which is practically a court of equity, may regard the money as the money of the estate in her hands, and make the distribution upon that basis.

MARRIED WOMAN BOUND TO OBSERVANCE OF GOOD FAITH IN HER DEALINGS. — A married woman, in her dealings with the world, is held to the observance of that good faith to which others are bound; the protection which her coverture affords her is for the prevention of fraud, and she ought not to be thereby enabled to defraud others with impunity.

THE auditing judge, Penrose, J., decided that the one thousand dollars referred to in the opinion should be charged against Mrs. Starr's distributive share in her mother's estate. To this decision she excepted, and after argument before the court in Bank, Ferguson, J., delivered the following opinion, in which the facts are stated: "The decision of the auditing judge in this case was so manifestly equitable and just that if it were necessary we would perhaps be justified in straining a point to sustain him in the conclusion which he has reached; but there is no necessity to do this, as we think he is sustained by abundant authorities. A daughter of the decedent had received from her the sum of one thousand dollars, for which she gave an acknowledgment in writing, and during her lifetime made at least one payment of interest on the same. In the distribution of the decedent's estate it was sought to charge this sum against her distributive share. This was resisted, upon the ground that it was not an advancement, because a mother cannot make an advancement, and also because it was a debt; and it was not a debt, because the daughter was at the time a married woman, and therefore incapable of contracting any debt. It was not alleged that it was a gift, and if it was, the paper signed at the time, and the payment of interest, negative any claim of this kind. In a word, this daughter holds one thousand dollars belonging to the estate of her mother, without any consideration. This she claims to keep, so that, in the distribution of this small estate, she receives one thousand

dollars more than each of the other five children. It is needless to discuss the question whether this money is to be considered as an advancement or a loan, because the daughter repudiates both of these positions, for the reason that to admit either leaves no room to escape from her share being charged with it. The honest and proper thing to do is what she desires to avoid doing; and to accomplish this desire, she invokes all the technicalities which her coverture throws around her. Does her coverture permit her to be dishonest? This is the question which this case presents for our consideration. There is no doubt but that when this money was given to the daughter, it was intended by both parties to the transaction as a loan. The daughter received the money with that understanding. She now says: 'I was a married woman and incapable of making a contract, and it is therefore void.' She repudiates the contract, but keeps the money which was the fruit of it. This position is so unconscionable that no court of equity would sustain it for a moment. It is well settled that one who avoids a contract by setting up his or her inability to enter into it must return the consideration. This was held in *Fulton v. Moore*, 25 Pa. St. 468, to apply to the contracts of married women as well as those of infants. In the very recent case of *Bigham's Appeal*, 123 Pa. St. 262, 10 Am. St. Rep. 522, the supreme court say: 'Married women have no license to do such unconscionable and unreasonable things as this, especially when they have enjoyed the fruits of the judicial action, which they solicited and procured, for nearly half of a century. Courts of justice are not convenient playthings to be used by designing persons for their private purposes, even though they be married women. Such tribunals cannot be expected to stultify themselves in order to gratify the wrongful or dishonest purpose of a litigant because she has a husband.' In *Grim's Appeal*, 105 Pa. St. 382, the court says that 'a married woman should be held to the observance of that good faith in her dealings with the world to which others are bound. Her protection is for the prevention of fraud. She should not thereby be enabled with impunity to defraud others.' To the same effect, see also *Couch v. Sutton*, 1 Grant Cas. 114; *McCullough v. Wilson*, 21 Pa. St. 436; *Fryer v. Rishell*, 84 Pa. St. 521; *Brown's Appeal*, 94 Pa. St. 362; *Powell's Appeal*, 98 Pa. St. 403. In this case, the contract of loan having been repudiated by the exceptant on account of her coverture, it is at an end, and the money should have been

returned. As this has not been done, and the money still remains in her possession, we agree with the auditing judge that in order to accomplish justice she must be considered as holding it as custodian or bailee for the estate, and in the distribution it should be deducted from her share thereof. The exceptions are dismissed, and the adjudication confirmed." The exceptant appealed.

F. Carroll Brewster, for the appellant.

Richard C. Dale, Henry C. Terry, and James F. Bullitt, for the appellees.

STERRETT, J. While it is not technically accurate to say that appellant is a bailee for the estate of the money she received from her mother, since deceased, we agree that, having repudiated the note in which she promised to repay it, she was bound, in equity and good conscience, to return it to her mother, or to her personal representative after her decease, and that it may therefore be regarded in equity as money of the estate in her possession. The orphans' court is practically a court of equity; and when it appeared that appellant, who was there claiming a full distributive share of her mother's estate, had virtually in her possession money which should have formed a part of the fund for distribution, the court might well act on the maxim of equity that what ought to have been done has been done, and proceed to distribute the fund accordingly. As was well said in *Grim's Appeal*, 105 Pa. St. 382: "A married woman should be held to the observance of that good faith in her dealings with the world to which others are bound. Her protection is for the prevention of fraud. She should not thereby be enabled with impunity to defraud others." The course of procedure adopted by the court below was well calculated to prevent any such result in this case, and we think it is sustainable on reason as well as authority.

It is unnecessary for us to further consider the subject. It has been so fully and ably discussed by the learned judge of the orphans' court that, for reasons given in his opinion and the authorities cited in support of them, we are satisfied there is no error in the decree or in the proceedings leading thereto.

Decree affirmed, and appeal dismissed, at the costs of appellant.

MARRIED WOMEN. — Coverture disables a woman with respect to making binding contracts, but should not constitute a protection for her frauds:

Walker v. Brooks, 99 N. C. 207. Compare *Brown v. Thomson*, 31 S. C. 436; 17 Am. St. Rep. 40, and note 47, 48; *Dobbin v. Cordiner*, 41 Minn. 165; 16 Am. St. Rep. 683.

ADVANCEMENTS. — As to the definition of an advancement, and what may constitute it, see extended note to *Miller's Appeal*, 80 Am. Dec. 559-565.

OLIVER'S ESTATE.

[126 PENNSYLVANIA STATE, 42.]

UNINCORPORATED JOINT-STOCK COMPANY FORMED FOR BUYING AND SELLING LANDS, RIGHTS OF STOCKHOLDERS IN, AND NATURE OF THEIR INTERESTS. — Where an unincorporated joint-stock company is formed for buying and selling mineral lands, and its articles of association provide that the property of the association shall be vested in trustees, chosen from among the stockholders, who shall have power to purchase, sell, and convey both real and personal property; that the interest of each member of the association in its property shall be represented and measured by his shares of stock, which shall be transferable by assignment, recorded in the books of the company, and a surrender of the original certificate of stock, — 1. Such association is an artificial juridical person capable of acquiring, holding, and selling property; 2. Its stockholders have no title to its lands, but merely a resulting interest in the business and assets, which can be legally ascertained only by an account; 3. Such company is not dissolved by the death of a stockholder, nor is the nature of his interest as a stockholder changed by his death, and a dividend declared on the stock after his death is governed by the same rules as one declared in his lifetime; 4. If a testator owning such stock bequeaths the income of his estate to one person for life, with remainder to another, a dividend declared after his death out of the proceeds of a sale of land, the company's capital remaining unimpaired, is income within the meaning of the will, and must go to the life tenant, if earned after the testator's death; 5. Such dividend must be regarded as earned after the testator's death, when the profit on the sale of the land is due to a discovery of mineral deposits after his death, although the discovery was not made by the company itself.

THE trustees under the will of George L. Oliver filed their first account, which was called for audit before Hanna, P. J., who decided that the \$108,849 referred to in the opinion was properly included by the trustees in their account as income, and awarded the same to Mrs. Catherine M. Richardson, the daughter of the testator, as legatee for life. Exceptions to the adjudication were filed by the Merchants' Fund Association, and, after argument before the court in Bank, were dismissed, Ferguson, J., delivering the opinion of the majority of the court. The exceptant appealed. The other facts are stated in the opinion.

James Bayard Henry and George Junkin, for the appellant.

Richard C. Dale and Henry C. Olmsted, for the appellee.

WILLIAMS, J. The contest in this case is between the life tenant and the remainderman, and the question is, whether the fund in the hands of the trustees is income or principal. It appears that George L. Oliver was one of the persons who organized the Metalline Land Company of Lake Superior, and that he remained a member of the company until his death, in 1886. This company was organized on the joint-stock plan, with a capital divided into twenty thousand shares having a nominal or face value of five dollars each. At the time of his death Oliver held 5,582 shares. By his will he made some specific gifts, and placed the residue of his large estate in the hands of trustees, with directions to pay the net income derived therefrom to his daughter, during her life, and the principal, after her decease, to the Merchants' Fund Association for certain charitable uses. The Metalline Land Company owned about six hundred acres of land when Oliver died, and two years later sold forty acres of it for a half-million dollars. The larger part of this price has been divided by the company among its stockholders, and the dividend accruing to the Oliver stock is over one hundred thousand dollars. The daughter claims it as income; the appellant claims it as principal. To which of them should it be awarded?

Before determining this question it will be best to consider some preliminary ones that lead up naturally to it. These are: 1. What is the legal *status* of the company? 2. What is the relation of the stockholders to the company? 3. What is the interest of a stockholder in the company property?

The company is unincorporated, and is a partnership organized on the joint-stock plan by the contract entered into by its members. This contract designates and describes the business to be done, the capital to be used, and how it is to be paid in by the members, and limits the number of persons by whom the affairs of the company are to be conducted. It provides that the interest of each member in the joint fund is to be measured by his shares of stock, which he may sell and transfer without consultation with his associates and without impairing the power of the trustees or the existence of the company. The partnership thus formed, whatever the liability of its members to third persons may be, is an artificial juridical person capable of acquiring, holding, and selling property.

Ordinarily, a partnership can convey its real estate only by the deed of all its members, but this company gave to its trustees power to buy, encumber, and sell land for it in their own names. It was a dealer in land as a commodity, using the names of its trustees in all its transactions. The principle that an unincorporated company or firm may deal in land, and that where it does so it holds the title, and may encumber or convey it, was settled in *Brady v. Colhoun*, 1 Penr. & W. 140. The relation of the stockholders to the company is also settled largely by the articles of agreement. They contribute the capital, select the trustees who are to use and invest it, and are entitled to a distributive share of the profits made in the business. As between themselves, however it may be as to others, they are liable for losses in proportion to their stock. They have, however, no power to use the name of the company, to interfere with its business, or to bind it in any manner. This power they have voluntarily surrendered, and have committed it to the trustees selected by them as the agents and representatives of the company; so that the firm or company speaks, not through its members as such, but through its trustees. These are liable for their fidelity to the trust, and for all profits made in the business, in substantially the same manner that a board of directors is liable to the stockholders in an incorporated company. In partnerships of the ordinary character, each partner is the agent of his firm, has personal contact with and control over its affairs, and the right to possession in common with his copartners of the firm property; but under the agreement organizing the Metalline Land Company, the relation of the individual member to the firm was changed, and his rights reduced so that the stockholder had only a right to participate in the election of trustees and to receive his share of the money made.

The interest of the stockholder in the company property is controlled by his relation to the company under his agreement and by the nature of the business done. The object in buying was, not to mine or operate in any other manner, but to sell again so as to make gain by the purchase and sale of land, and the articles provided for the division of the profits made by such purchase and sale among the stockholders. The interest of each member was therefore an interest in the profits made. He had no title to the land bought by the trustees for the company, as a tenant in common or otherwise, and could neither convey nor encumber it. His interest in it was personal estate,

and the extent of that interest was shown by his certificates of stock: *Kramer v. Arthurs*, 7 Pa. St. 165; *Brady v. Colhoun*, 1 Penr. & W. 140. The company was the real owner of the land, and the trustees acting for it could alone encumber or convey it. The stockholder had, as a partner has, a resulting interest in the business and assets of the company, which can be legally ascertained only by an account: *Meily v. Wood*, 71 Pa. St. 488; 10 Am. Rep. 719. The purchase of real estate by a firm or company dealing in it is, as between itself and its members, a conversion of it into personalty, and the levy and sale of the land upon a judgment against an individual member of the firm passes no interest or estate in it to the purchaser. The creditor of one partner can acquire by levy and sale of his debtor's interest no greater right than his debtor held; viz., the right to an account and to a distributive share of what may remain after the payment of the firm debts on final settlement: *Ebbert's Appeal*, 70 Pa. St. 79; *West Hickory M. Ass'n v. Reed*, 80 Pa. St. 38; *Meily v. Wood*, 71 Pa. St. 488; 10 Am. Rep. 719. The interest of Oliver as a stockholder in the land company was, therefore, not that of a tenant in common of its lands, but that of one entitled to share in the profits of its business. The trustees under his will succeeded him as holders of his shares, and their interest as such holders is neither greater nor less than his interest was while he was living.

The company was not dissolved by Oliver's death, and has not yet been dissolved. It has done but little business for several years, but it has paid the taxes on its lands and kept up its own organization, and still holds undisposed of nearly six hundred acres in the names of its trustees. The relation between it and the holders of its stock is therefore the same since Oliver's death as before. He had no title to the lands of the company while he lived, and none could pass from him to the trustees under his will by reason of his death. His interest as a stockholder was personal estate in his hands, and it is personal estate now in the hands of his representatives. The dividend made by the company out of the proceeds of the forty acres has the same character and is governed by the same rules as though it had been made in his lifetime. It represents part of the difference between the cost of the land sold, including taxes and expenses, and the price received for it. That difference is the profit made by means of the purchase and sale of the land, which it is the duty of the trustees to divide among the stockholders. It is clear, therefore, that this

dividend is personal estate, and represents gain or profit made in the proper business of the land company,—that of buying land for purposes of sale, and selling it with a view to make gain for the stockholders. The will directs the payment of the net income from his estate, real and personal, to his daughter, and as this dividend represents income, it goes to the daughter, and not to the remainderman. The shares are part of the residuary estate, and belong to appellant. The profit accruing from the sale of lands is income from the investment in the stock of the land company, and if made since the death of Oliver, is not to be distinguished from income derived from any other source.

This leads us to the only other question, which is, When was the profit out of which this dividend is declared earned? It is urged that it has not been earned since Oliver's death, and that for that reason, admitting it to represent profits, it belongs to the remainderman under the rule in *Earp's Appeal*, 28 Pa. St. 368. The argument is, that the phenomenal advance in the price of this piece of land is not due to anything done by the land company, by way of development or otherwise, but to the presence of a rich deposit of copper ore which was in place when Oliver died. For this reason, it is said, the real value of the land has not changed; nothing, therefore, has been gained by reason of anything done by the company.

The reply to this is, that the object of forming the company was to buy lands in advance of any general knowledge of their mineral value, and by means of openings or borings, develop their true value and then sell. Whether the work which demonstrated the existence of the deposit of copper on the forty acres was the work done by it or by its neighbors, is unimportant. The mineral value was made apparent in either case, and a sale at a greatly increased price made possible. The increased price came, not from a change in the actual value, but from a correct knowledge of that value, which increased the market price. This knowledge was acquired, and the price advanced in consequence of it, after Oliver's death. When he died the stock was thought to be of little value, and the lands could not have been sold at a profit. There were, therefore, no accrued or undivided profits to pass to the remainderman, and the wonderful advance made since his death has been earned, within the meaning of the rule in *Earp's Appeal*, 28 Pa. St. 368, by means of developments made in the neighborhood since the title was vested in the trustees named in his

will. *Earp's Appeal*, 28 Pa. St. 368, is therefore in harmony with our holding in this case. The same is true of *Willbank's Appeal*, 64 Pa. St. 256; 3 Am. Rep. 585, and *Moss's Appeal*, 83 Pa. St. 264; 24 Am. Rep. 164. In the latter case, the question was over the character of the option to subscribe for new shares of stock, belonging to existing stockholders by virtue of their ownership; and this court held that the option did not represent profits earned, but the right of the holder to increase his investment with a view to enlarged operations and greater profits to be earned thereby in the future. It belonged, therefore, to the owner of the stock, and not to the owner of the income.

The circumstance that the entire block of shares in the land company was appraised at five dollars is without significance. It is now clear that the shares are worth all that has been invested in them, and that the remainderman is many thousands of dollars better off than was supposed when the inventory was taken, but the net income is not his; that goes to the daughter.

The decree of the court below is affirmed, and the costs of this appeal are to be paid by the appellant.

UNINCORPORATED JOINT-STOCK COMPANIES. — Joint-stock companies are mere partnerships, except in form: *Robinson v. Smith*, 3 Paige, 222; 24 Am. Dec. 212. Land may be conveyed to trustees in trust for stockholders and their heirs in an unincorporated company: *President etc. v. Minor*, 9 Smedes & M. 544; 48 Am. Dec. 727. Members of unincorporated companies are liable as partners: *Lynch v. Postlethwaite*, 7 Martini, N. S., 69; 12 Am. Dec. 495, and note. Members of an unincorporated company may confer authority to sell its property upon a committee composed of some of the company: *Curtiss v. Hoyt*, 19 Conn. 154; 48 Am. Dec. 149.

TRUSTS — STOCK DIVIDENDS. — Where a testator bequeathed the "income, profit, and products" of certain stock in a corporation to one for life, with a remainder over to another, and afterwards the corporation increased its capital stock, allowing each stockholder the option to take at par as many new shares as he owned of the old, and the trustees under the will sold part of their options to take new shares, and with the proceeds bought new shares, it was decided that the new shares were capital, and went to the remainderman: *Moss's Appeal*, 83 Pa. St. 264; 24 Am. Rep. 164, and particularly note 169-172. The remainderman may, however, acquiesce in the turning-over of the corpus to the life tenant, and be bound thereby, unless he was uneducated, just of age, and dependent upon the trustee, and the accounts were so complicated that he was not fully conversant therewith: *Sedgwick v. Taylor*, 84 Va. 820.

WISCHAM v. RICKARDS.

[186 PENNSYLVANIA STATE, 109.]

SERVANT CANNOT IMPOSE ON HIS MASTER HIGHER LIABILITY THAN LATTER IS UNDER TO HIMSELF. — A servant cannot by any act of his impose upon his master a higher liability for negligence than the master is under to the servant himself. A person, therefore, who assists a servant, at the latter's request only, can have no different remedy against the master from that which the servant himself has; and as a servant engaged in the service of a common master, and in a common employment, cannot recover against the master for injuries received through the negligence of a fellow-servant, so such person who joins in the service at the servant's request, and is so injured, cannot recover against the master, because he makes himself one of a class, who, as against their master, have no right of recovery for one another's negligence. Nor does it make any difference in such case that such person rendered the assistance in obedience to an order of his own superior, made in response to a call proceeding from the servant to whom such assistance was rendered. And the same rule applies where the work in doing which the injury is received is a joint movement, in which are interested both the master of the person injured, and the master of the servant at whose request the service is rendered.

TRESPASS. There was a verdict and judgment for the plaintiff, and the defendant appealed. The other facts are stated in the opinion.

William W. Wiltbank, for the appellant.

E. H. Hanson and E. F. Hoffman, for the appellee.

GREEN, J. This case is an exceedingly close one, highly exceptional in its facts, and apparently without a precedent among the authorities. The defendant was delivering a heavy fly-wheel, weighing five thousand pounds, to a Mr. Blessing, at the factory of the latter. The wheel was divided into two equal sections, and the first of them had been delivered on the pavement in front of Blessing's factory in the morning. Blessing's men, under his direction, had put up a scaffolding as high as the doorway leading into the building, about two feet high, and had raised the section already delivered up nearly to the top of the scaffold, when Rickards's men returned with the other section and insisted upon unloading it at once. The first section was then dropped down, and the chain taken off and fastened to the second section, and it was raised clear of the wagon and over the scaffold. Some difficulty was experienced with the rope and chain, and the section was dropped till it rested on the scaffold and against the wall. While in that position, Harvey, Rickards's foreman, climbed up on the

wheel and loosened the chain and stepped down on the rim of the wheel, and it was claimed by the plaintiff his weight on the rim caused the wheel to topple over and fall on the plaintiff and injure him. It was testified by Weigel, as well as by Wiegner, Blessing's foreman, that while the wheel was being moved, just about the time the chain became tangled, Harvey called for help, and Wischam was either called for by Wiegner, or he happened to be on the ground, and he assisted in moving the wheel. Wiegner and Weigel were Blessing's men, and they were assisting, and when Wischam came up he was told, as he testifies, by Wiegner to catch hold of the chain. He does not say whether he did so or not, nor does any other witness say what he was doing at the moment of the accident, but they all say that when the wheel fell he was under it. There was a lack of definite statement on this subject, and it does not appear that the attention of the witnesses was called to it in their examination. However, it is a fair inference that Wischam was called by Wiegner to assist, and that he did assist in some way, or was present for that purpose when he was injured. Wischam says Wiegner called to him to come out and help, and told him to take hold of the chain. Wiegner says he don't recollect calling him, but that he saw him around, and that he did help. As the court charged the jury that if Wischam was a mere volunteer he could not recover, we will have to assume that the jury believed his statement that he was directed by Wiegner, who was his boss or foreman, to help, and did help in consequence of that direction. The case, on its facts, then, stands thus: Wischam, being one of Blessing's men, assisted in moving the wheel at the instance of Blessing's foreman, who called for him by the request of Harvey, Rickards's foreman, and received his injury whilst rendering assistance in these circumstances. The case, or rather the question of Rickards's liability, is complicated by the fact that the movement of the wheel was a joint movement in which both Blessing and Rickards were interested, and by the fact that Wischam acted under orders from his own foreman. Rickards was certainly not bound to put the wheel inside Blessing's building. His delivery would have been complete when delivery on the pavement or on the scaffolding was made. The first section was completely delivered when it was deposited on the pavement. But Blessing wanted the wheel in the building, and while the men were all there, that was what they were trying to do, and in that

act all the men were participants. It is true, the delivery from the wagon on the platform was not quite completed when the accident happened, and therefore we think it must be regarded as having happened while the defendant's men were performing their act of delivery.

Now, it is perfectly clear that if the plaintiff was a mere volunteer, — that is, assisted entirely of his motion, by his own voluntary proffer of service, — the defendant would not be liable. All the authorities are that way, and so the court charged the jury. The question is, If he assisted, at the request of the defendant's servant, or in consequence of such request, is the defendant liable? There are two cases, one of which was cited in the paper-books, which have a very important bearing on that question. One of them is the case of *Potter v. Faulkner*, 101 Eng. Com. L.; 1 Best & S. 800. The defendant's porters were lowering bales of cotton from the defendant's warehouse, and his carter was receiving them into his lorry (small wagon). The plaintiff, who was waiting with a lorry to receive a load of cotton for his master, at the request of the defendant's carter, assisted him, and in consequence of the negligence of the defendant's porters, a bale of cotton fell upon and injured him. Held, that the defendant was not liable to an action. In the report of the case, the following facts are stated, amongst others: "The lorry which was being loaded at the time of the accident was the property of the defendant, and the parties above, and the carter below, were his servants, of which the plaintiff, before the accident, had notice. The carter of the defendant's lorry, which was being loaded in the manner before mentioned, requested the plaintiff, who was waiting with his master's lorry for his turn, to help him to move into their proper places in his cart the bales which were being lowered for him. The plaintiff thereupon got upon the defendant's lorry, and was assisting him when the accident happened." The court, Erle, C. J., said: "The plaintiff intervened to assist the servant who was in the cart, and, so far as the master was concerned, was a volunteer upon the occasion, and was injured by what was found to be negligence in the defendant's servants in the warehouse. The question is, Can the plaintiff, under the circumstances, sue the master for the negligence of his servants? This is the case of one who volunteers to associate himself with the defendant's servant in the performance of his work, and that without the consent or even the knowledge of the master. Such a one

cannot stand in a better position than those with whom he associates himself, in respect of their master's liability; he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his actual employ; and it is clear law that the master would not have been liable if the servant below had been injured by the negligence of the servants above. As between master and servant, the duty of the master is to take due care to employ other servants of competent skill and ordinary carefulness; when he has done that, he has done his duty as between himself and his servants, and we are of opinion that the liability contended for by the plaintiff does not attach to an employer.

It will be perceived that the court considered the plaintiff to be a volunteer, notwithstanding he intervened only at the request of the defendant's servant. Now, while it may seem a little strained to call such a person a mere volunteer, the reason given for the non-liability of the master is more substantial, to wit, that the plaintiff's act of associating himself with the defendant's servant, in the performance of the work, was done without the knowledge or consent of the master, and therefore he could acquire no better position than that of the servant with whom he associated himself.

The other case to which reference has been made is *Flower v. Pennsylvania R. R. Co.*, 69 Pa. St. 210; 8 Am. Rep. 251. In that case, a locomotive being at a water-station in the city of Lancaster, the fireman asked a boy ten years old, standing there, to turn on the water. Whilst he was climbing on the tender to put in the hose, the remainder of the train came down with the ordinary force, and struck the car attached to the engine; the jar threw the boy under the wheels, and he was killed. In an action by the parents for his death, it was held that the company was not liable. Agnew, J., in delivering the opinion, said: "The true point of this case is, that in climbing the side of the tender or engine at the request of the fireman to perform the fireman's duty the son of the plaintiff did not come within the protection of the company. To recover, the company must have come under a duty to him which made his protection necessary. Viewing him as an employee at the request of the fireman, the relation itself would destroy his right of action: *Caldwell v. Brown*, 53 Pa. St. 453; *Weger v. Pennsylvania R. R. Co.*, 55 Pa. St. 460; *Cumberland V. R. R. Co. v. Myers*, 55 Pa. St. 288. Had the fireman himself fallen, in place of the boy, he could have had no

remedy. It does not seem to be reasonable that his request to the boy to take his place, without any authority, general or special, can elevate the boy to a higher position than his own, and create a liability where none would attach had he performed the service himself."

The very important proposition declared in this case is, that the servant of the company cannot impose a higher liability upon it than it was under to himself, by any act of his, and that the person rendering assistance in the service of the company at the request of its servant can have no other or different remedy against the company than the servant himself had. It seems to be a reasonable doctrine, founded in sound principles, and it has received full judicial sanction in the two cases cited.

Degg v. Midland R'y Co., 1 Hurl. & N. 773, was the case of one who was a pure volunteer, but the reasoning of the opinion is in conformity with the same doctrine. Bramwell, B., thus states the facts and decision: "The defendants were possessed of a railway and carriages and engines; their servants were at work on the railway in their service with those carriages and engines; the deceased voluntarily assisted some of them in their work; others of the defendants' servants were negligent about their work, and by reason thereof the deceased was killed; the defendants' servants were competent to do the work; the defendants did not authorize the negligence. We are of opinion that, under these circumstances, the action is not maintainable. The cases show that if the deceased had been a servant of the defendants, and injured under such circumstances as occurred here, no action would be maintainable; and it might be enough for us to say that those cases govern this, for it seems to be impossible to suppose that the deceased, by volunteering his services, can have any greater right or impose any greater duty on the defendants than would have existed had he been a hired servant."

It will be seen that the fundamental idea of the reasoning is, that the volunteer can have no greater rights than those servants have who are engaged in the service in which he joins; and it is not so much because he is a volunteer as because he makes himself one of a class who, as against their masters, have no right of recovery for each other's negligence. This appears plainly enough from another consideration. If a servant is paid for his service, of course he has only the rights of associated servants, and those do not include a

right of recovery for the negligence of a fellow-servant. Why should he have a higher right where he is not paid? Baron Bramwell, meeting this idea in the case cited, says: "But we were pressed by an expression to be found in those cases, to the effect that 'a servant undertakes, as between him and the master, to run all ordinary risks of the service, including the negligence of a fellow-servant': *Wiggett v. Fox*, 11 Ex. 832; and it was said there was no such undertaking here. But in truth there is as much in the one case as in the other; the consideration may not be as obvious, but it is as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself from the negligence of his fellow-workman, as if he were paid for his services."

It is manifest, therefore, and is perfectly well settled law, that one who is engaged in the service of a common master, and in a common employment, cannot recover against the master for the negligence of a fellow-servant, whether he is paid for his service or not. Now, the cases of *Potter v. Faulkner*, 101 Eng. Com. L., 1 Best & S. 800, and *Flower v. Pennsylvania R. R. Co.*, 69 Pa. St. 210, 8 Am. Rep. 251, first above cited, are full authority for the further position, that if the stranger joins in the service at the request of one of the servants of the master, he is in no better position than a mere volunteer.

In the present case, the plaintiff's intervention in the service in which he was injured was induced by the order of his own superior, and the learned court below thought, and so held, that he could not be regarded as a volunteer, but rather as in the performance of a duty. At first blush, this seems very forcible and quite reasonable, and it had much weight with the writer until a thorough study of the subject and of the authorities led him to a different view. As I regard the matter, the cases teach us that it is not because the associated servant is a volunteer that he is denied redress for the negligence of a fellow-servant, but because it is the well-established law of the relation between the servants whom he joins and their master that there is no such liability on the part of the master. Hence, by joining them in their common service, he becomes, as to the master, one of them, with the same rights and duties as to the master, but with no higher rights as against him. Certainly, without his consent, he cannot rea-

sonably be subjected to a greater obligation by the act of one of his servants in engaging the service of another than he is under to that servant. If this be so, as was held in the cases cited, how does it matter in what manner the request of the defendant's servant was communicated to the plaintiff? Let it be that it came in the form of an order from his own superior, and that he was in duty bound to obey that order. It was still only done at the request of the defendant's servant, and the question we have to decide is, the liability of the master. We have seen that his liability cannot be increased, without his consent, by the act of his servant; and it is that reason, which is fundamental in the discussion, which demonstrates his freedom from obligation for his servant's act. But if this is the determining reason of the argument, it is just as applicable where the servant's request is communicated through, or made the basis of an order by, a third person to the plaintiff. It is very plain, for that is decided, that if Wiegner, who was Wischam's superior, had himself joined the service at the request of Harvey and been injured, he could not have recovered. How, then, can he confer upon Wischam, who is at best only his representative, a right of action against Rickards which he did not possess himself? We cannot see. It may be true that Wischam was subject to a duty to obey Wiegner, but that was no duty to the defendant; it was no duty to which the defendant had any relation whatever, and it is only the defendant's obligation that is in question here.

We cannot think, therefore, that the defendant's liability was in any manner increased by the fact that Harvey's request for assistance was answered by Wischam's joining in the service in consequence of an order from his superior. It was still only a participation by Wischam in an associated service, the law of which excludes him from compensation to be recovered from the master for the negligence of his associates.

There is, however, a feature of the subject which requires consideration, and it is that which makes this case so exceedingly close. It is illustrated in the case of *Abraham v. Reynolds*, 5 Hurl. & N. 142. There the plaintiff, a servant of I. & Co. who was employed by the defendants to carry cotton from a warehouse, was receiving the cotton into his lorry when, in consequence of the negligence of the defendants' porters in lowering the bales from the upper floor of the warehouse, a bale fell upon him. Held, that the plaintiff and the defend-

ants' servants, not being under the same control, or forming part of the same establishment, were not so employed upon a common object as to deprive the plaintiff of a right of action against the defendants for such negligence. The facts found by the assessor were, that the plaintiff went to the warehouse of the defendants to receive cotton bales into his wagon and carry them to his employers; that the cotton was in a room on the fifth floor, and was lowered by the defendants' servants into the lorry below. The plaintiff brought his lorry under the warehouse and received three or four bales, when one of the defendants' men called to him to pull in a bale; while he was doing so another bale fell upon him from above. It was argued that there should be no liability on the part of the defendants, the owners of the warehouse, because the plaintiff was engaged in a common service with the defendants' servants. But the court held otherwise, substantially on the ground that the plaintiff was merely acting for his own master, and was necessarily present for the purpose of receiving the cotton, and therefore had no relation with the defendants. Pollock, C. B., said: "When two persons serve the same master, one cannot sue the master for the negligence of his fellow-servant. The rule applies to every establishment. No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect of which, if he had been a stranger, he might have had a right of action. . . . Here it is said that there was common work. If it was agreed that this work should be done by all, the rule might apply; but it does not apply merely because the parties had a common object, if they had separate ends, and for some purposes, antagonistic interests. There, as in a case, put by my brother Martin during the argument, of warping a vessel into a dock, mariners at one end and dock-laborers at the other, dragging at a rope, either party would be entitled to bring an action for an injury received in consequence of the negligence of the others. It is carrying the matter too far to say that the mariner would have no right of action against the employer of the dock-laborers if injured by the negligence of the latter. They have different objects and different liabilities." This reasoning clearly illustrates the grounds of the decision. The plaintiff was merely receiving the cotton as the agent of his own master, and while doing so was injured by the negligence of the warehouseman's

servants. There was no community of service, as each was in the employ of a different master.

Another case of a similar kind is that of *Wright v. London etc. Ry Co.*, L. R. 1 Q. B. D. 252. There the plaintiff shipped a heifer in a box-car of the defendant's road, and took passage on the same train himself. On arriving at the station, the car was shunted to a siding to get the heifer off. There were only one or two porters available to shunt the box-car, and the plaintiff assisted in shunting the car to the side-track to get the heifer off, and while doing so, the box-car was run into by a train, which had been negligently allowed by the defendant's servants, and the box-car was driven against the plaintiff, and seriously injured him. It was held the defendant was liable for the injury, because the plaintiff was not acting merely as a volunteer, and he was not a fellow-servant, but only assisted in the delivery of his own goods on his own behalf. Lord Coleridge said: "It is plain that the plaintiff was not acting merely as a volunteer, in which case he would have been bound to take all the risks upon himself which he met with in the employment. Nor was it the case of master and servant, in which case the defendants would not have been liable for the negligence of a fellow-servant. But the defendants being bound by contract to deliver the heifer to the plaintiff, they, by their representative, the station-master, allowed the plaintiff to take part in the delivery, and they were therefore bound to see that he did not get injured by the negligence of their servants." Cleasby, B., said: "It is said that as the plaintiff was assisting the defendant's servants, he became a fellow-servant. But this distinction makes no difference, for this reason: persons who engage in work with fellow-servants are said to take the chances of the sort of negligence which they themselves or their fellow-servants may be guilty of. Is the plaintiff here in the position of a fellow-servant? The plaintiff was in that position in *Degg v. Midland Railway Co.*, 1 Hurl. & N. 773, and in *Potter v. Faulkner*, 101 Eng. Com. L., 1 Best & S. 800. But he is not so here. He has not agreed to be the fellow-servant of the defendant's servants. But, according to a usual practice, he has assisted in the delivery of his own goods on his own behalf, not as a servant of the company."

These citations indicate the grounds upon which the decision was put, and they are, in substance, that the plaintiff had a right, on his own behalf, to be present, and aid in the deliv-

ery of his own goods, without thereby assuming the relation of a servant to the defendant. In the present case, that was not the fact. The plaintiff did become one of the servants of the defendant to assist in the defendant's act of delivering the wheel. He was so acting in response to the request of one of the defendant's servants; he had no right or interest in the wheel or its delivery, and what he did was done on behalf of the defendant, and in conjunction with the defendant's servants. The delivery was not completed, but was going on when the accident occurred, and the delivery was the act of the defendant. The participation of the plaintiff was not that of an owner receiving his own goods, but was that of a servant assisting the servants of the defendant, and this circumstance brings it within the rule of non-liability. The distinction is refined, but it seems to be substantial, and we feel constrained to recognize it and enforce it.

Judgment reversed.

MASTER AND SERVANT — FELLOW-SERVANTS — VOLUNTEERS. — A person voluntarily assisting the servant of another in the performance of his duties, either gratuitously or at the request of the servant, cannot recover against the master for an injury, received while so assisting, in consequence of the servant's negligence: Note to *Fox v. Sandford*, 67 Am. Dec. 597; *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320; *ante*, p. 362.

KUNTZLEMAN'S TRUST ESTATE.

[136 PENNSYLVANIA STATE, 142.]

TRUST FOR COVERTURE FALLS IF THERE IS NO MARRIAGE in fact or in contemplation, or if the *cestui que trust* becomes discover by the death of her husband; and the fact that the trust imposes active duties upon the trustee does not prevent this result.

ACTIVE TRUST WILL BE SUSTAINED WHEN. — Where an active trust is created to give effect to a well-defined lawful purpose of a testator in relation to his family, the trust will be sustained, whether the *cestui que trust* be *sui juris* or not. Where, therefore, the testator's object was by means of the trust to protect the *corpus* of the estate for the parties entitled in remainder, the trust will be upheld in support of the remainder.

RULE IN SHELLEY'S CASE, DEVISE NOT WITHIN, WHEN. — To bring a devise within the rule in Shelley's case, the limitation in remainder must be to the heirs in fee or in tail, as a *nomen collectivum* for the whole line of inheritable blood. In the case, therefore, of a devise of income to a daughter of the testator for life, with a limitation over to her heirs, excluding her husband and mother, the rule does not apply. And the circumstance that both the husband and mother have died since the death of the tes-

tator can have no effect. The testator's intent must be ascertained from the words of the will, which are to be read in the light of the circumstances under which it was written.

THE orphans' court sustained the trust referred to in the opinion, and awarded the balance, constituting the *corpus* of the estate, to the trustee under the will, and Mrs. Kuntzleman appealed. The other facts are stated in the opinion.

R. H. and W. D. Neilson, for the appellant.

George Tucker Bispham, for the appellee.

CLARK, J. The will of the testator, Philip Dorney, was probated on the 16th of September, 1840; at that time his daughter, Amanda Cornelia, the appellant, was a child five years of age, of course unmarried, and not contemplating marriage. She was first married to Craig, June 14, 1855; her husband died in November, 1864. She was afterwards married to Kuntzleman, and survived her second husband also.

The testator's will contained a clause as follows:—

“And the remaining one full equal and undivided tenth part thereof unto the said George Miller, his heirs, executors, administrators, and assigns, in trust, nevertheless, to place and continue the personal estate at interest on good landed security or interest, or invest the same in some productive public funds or loans, and to pay the interest and income thereof, and the rents, issues, and profits of the real estate, unto my said daughter, Amanda Cornelia Dorney, for her sole and separate use, upon her separate receipt, without the control or interference of any husband she may have or take, for and during all the terms of her natural life; and from immediately after the decease of my said daughter, Amanda Cornelia Dorney, then, in trust, to and for the only proper use, benefit, and behoof of such person or persons as would be entitled to the same by the laws of the commonwealth of Pennsylvania, if my said daughter had survived her mother and husband, if any she may have, and died intestate, seised and possessed of the said premises, and for such estate and estates as such person or persons would in such case be entitled by the laws aforesaid.”

The appellant's contention is, that the whole purpose of the trust created by this clause of the will was a trust for coverture, or for the separate use of the testator's daughter, which fell for lack of a marriage, or a contemplated marriage, to sup-

port it; that as her mother and her husband are both dead, the parties to take at the daughter's death are her right heirs and that, by the rule in Shelley's case, she has an absolute estate in the fund for distribution. The appellees, on the other hand, contend,—1. That the trust is active during the continuance of the life estate of Mrs. Kuntzlemen; that her estate, therefore, is an equitable estate, whilst the estate to the heirs in remainder is legal, and that for that reason the former cannot coalesce with the latter; and 2. That even if the particular estate be held to be a legal estate, the estate in remainder is limited in language which does not bring the gift within the rule.

It is conceded on all hands that for the reasons already stated the trust cannot be sustained as a separate use, or as a trust for coverture, and the authorities are full and plain upon this point: *Wells v. McCall*, 64 Pa. St. 208; *Ogden's Appeal*, 70 Pa. St. 501. Nor, apart from the purpose of the testator with respect to the remainder, can we discover any other object to be attained by the trust, than a separate use for his daughter. In the case of each of his sons, the income was to be "free from their debts," etc.; and although the use of these words, perhaps, was not essential to create a spendthrift trust, their omission in the clause quoted is significant in the ascertainment of his purpose with respect to his daughter. There is nothing in this will to indicate the testator's intention to create a spendthrift trust; on the contrary, it is plain that his purpose was to create a trust for coverture.

Where an active trust is created to give effect to a well-defined, lawful purpose of a testator, in relation to his family, the trust will be sustained, whether the *cestui que trust* be *sui juris* or not. This was established in *Barnett's Appeal*, 46 Pa. St. 392, 86 Am. Dec. 502, overruling, in terms, *Kuhn v. Newman*, 26 Pa. St. 227, where a different doctrine had been declared; and the ruling in *Barnett's Appeal*, 46 Pa. St. 392, 86 Am. Dec. 502, has since been steadily maintained. See *Earp's Appeal*, 75 Pa. St. 119, and cases there cited. In these cases, however, the bequests and devises of income were to children for life, irrespective of coverture, and a clear purpose appeared to protect the *corpus* of the estate for the ultimate devisees.

But the cases cited, and many more in the same line and to the same effect, are clearly distinguishable from those in which the purpose of the testator is to create a trust for coverture. A trust for coverture is one of the well-settled instances, in

the doctrine of special trusts, where the trust falls if there is no marriage in fact or in contemplation to support it, or where upon the husband's death coverture ceases. And it is immaterial that the trust imposes active duties upon the trustee. These duties are only subsidiary to the main purpose; they are mere incidents or adjuncts to the trust; and if the trust itself falls, these active duties are dispensed with; they will not uphold the trust, — they fall with it: *Megargee v. Naglee*, 64 Pa. St. 216; *Yarnall's Appeal*, 70 Pa. St. 336; *Ogden's Appeal*, 70 Pa. St. 501; *Ashhurst's Appeal*, 77 Pa. St. 464; *Williams's Appeal*, 83 Pa. St. 377.

But we think the testator's purpose in part was, by means of this trust, to protect the *corpus* of the estate for the parties entitled in remainder, and we are of opinion that the trust should be upheld in support of the remainder. The bequest of the interest and income is expressly for life, and not during coverture, and is of the income only, not of the *corpus* of the estate. Those entitled in remainder are "such person or persons as would be entitled to the same by the laws of the commonwealth of Pennsylvania," if the daughter "had survived her mother and husband," and died intestate. The expression "such person or persons as would be entitled to the same by the laws of the commonwealth of Pennsylvania" may perhaps be taken to signify "heirs": *Dodson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 586; *Williams's Appeal*, 83 Pa. St. 377; and it may be assumed that the persons entitled under the words of the entire clause are such persons as, at the daughter's death, are her heirs at law, exclusive of her mother and her husband.

But, to bring the devise within the rule in Shelley's case, the limitation in remainder must be to the heirs in fee or in tail as a *nomen collectivum* for the whole line of inheritable blood. When the testator annexes words of explanation to heirs, or heirs of the body, as to heirs now living, etc., using the terms as mere *descriptio personarum*, or for the specific designation of individuals, a new inheritance is thereby grafted upon the heirs to whom the estate is given: 4 Kent's Com. 221; and they will be assumed to take as purchasers. The rule in Shelley's case, when applied to real property, enlarges the life estate into an inheritance. The heirs, in such case, therefore, take *qua* heirs, and it is not in the power of the testator to prescribe a different qualification to heirs from what the law prescribes when they take in the character of heirs.

For these reasons, we are of opinion that the limitation over

in this case does not bring the gift within the rule, even if the particular estate should be considered legal. The limitation is to some only of those who would take under the intestate law. The husband and the mother are expressly excluded. It is true, they are both now deceased, but that circumstance can have no effect; the testator's intent must be ascertained from and his will construed according to the words of the will; and these are to be read in the light of the circumstances under which the will was written. The merely accidental fact that the husband and mother are both now dead does not bear upon the testator's intent at the execution of the will, or determine its meaning when it took effect.

Yarnall's Appeal, 70 Pa. St. 336, may perhaps be regarded as authority for the proposition that the exclusion of the husband does not narrow the line of descent, when the donor's intention was to create a trust for the separate use of the wife. Mr. Justice Agnew, delivering the opinion of the court in that case, said: "It is argued that the exclusion of the husbands of the daughters in the remainder clause narrows the line of descent. But, clearly, this does not change the intent of the testatrix in this will, for it must be remembered that there were no husbands in existence, and that this so-called exclusion is an expression corresponding with the intent of the testatrix, which was to give the daughters separate estates, the effect of which would be to exclude the husbands." Whilst this reasoning is not entirely clear, it is plain that it does not extend to the exclusion of the mother.

We are of opinion that the rule in *Shelley's* case has no application; that the parties entitled at the death of the testator's daughter take by purchase; and the trust should be upheld to protect their rights.

The decree of the orphans' court is affirmed, and the appeal dismissed, at the cost of the appellant.

TRUSTS — MARRIED WOMEN — PENNSYLVANIA DOCTRINE. — In Pennsylvania an express trust for the separate use of a woman, even when active duties are imposed upon the trustee, so that really the trust is active, cannot be created unless she is already married, or unless it is made in contemplation of her marriage: Note to *Kay v. Scates*, 78 Am. Dec. 409.

TRUSTS — ACTIVE TRUSTS. — For a discussion of active trusts with reference to the application of the statutes of uses, see note to *Kay v. Scates*, 78 Am. Dec. 407-409. For instances of active trusts, see *Porter v. Lee*, 88 Tenn. 782; *Henson v. Wright*, 88 Tenn. 501; *Davis v. Williams*, 85 Tenn. 646; *Jourolmon v. Massengill*, 86 Tenn. 93.

RULE IN SHELLEY'S CASE. — The rule in Shelley's case is fully and thoroughly discussed in an extended note to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 100-107.

TRUSTS — CORPORATE STOCK — REMAINDERS. — For bequests of the income and profits of corporate stock in trust for life with a remainder over, see *Oliver's Estate*, 136 Pa. St. 43; *ante*, p. 894, and note.

LANCE v. GORMAN.

[186 PENNSYLVANIA STATE, 200.]

TITLE OF PURCHASER AT EXECUTION SALE PARAMOUNT TO ALL CONVEYANCES AND ENCUMBRANCES SUBSEQUENT TO JUDGMENT. — Though a judgment creditor is not a purchaser within the recording acts, a purchaser under his judgment has all the qualities of one, by relation, from the date of the lien, and his title is paramount to all conveyances and encumbrances subsequent thereto. It is therefore incumbent on a party alleging a resulting trust in his favor antedating the entry of such judgment to show that the purchaser at the sheriff's sale had notice, actual or constructive, of the equitable title or resulting trust at the time of his purchase.

POSSESSION OF PROPERTY AS NOTICE OF TITLE. — Possession of property by a tenant is notice of title in every form; but when the person having possession has placed on record a particular title consistent with that possession, the registry of it will restrict the generality of notice from possession, and narrow it to specific notice of that particular title. Where, therefore, land paid for by a wife's money is conveyed by mistake to her husband, and after the entry of judgments against him the husband and wife convey to a third person, who then conveys to the wife, and the the sheriff sells the land as the property of the husband, the wife giving notice to the bidders that the land was her sole and separate property, and that the sale would not pass title, such notice, being silent as to the fact that her title antedated the judgments, and that notice and the possession by her tenants being consistent with and referable to the recorded deed to her, is not sufficient notice to put the purchaser on inquiry as to the prior equitable title; nor is the possession sufficient for that purpose.

EJECTMENT. The opinion states the case.

F. W. Bechtel, John G. Johnson, and James B. Reilly, for the appellants.

James and John W. Ryon, for the appellee.

STERRETT, J. This action of ejectment was brought by plaintiff and her husband, since deceased, to recover possession of the lot in controversy, in her own right. Both parties claimed under Jacob Newkirk, who, by deed dated October 23, 1872, duly recorded, conveyed the lot to plaintiff's husband, Joel C. Lance, for the consideration of seven thousand dollars. In

1874, Lance and wife, by deed acknowledged and recorded in August of that year, "for and in consideration of one hundred dollars and divers other good and sufficient considerations them thereto specially moving," conveyed the same to David H. Klingerman, who, with his wife, thereupon, for the same consideration, by deed acknowledged and recorded on the same day, conveyed the same property to Anna Lance, the plaintiff. Her contention was, that the consideration paid to Newkirk was money of her separate estate; that her husband was merely trustee for her of the legal title, and that the conveyance to Klingerman and by him to her was solely for the purpose of uniting in her the legal with the equitable title. In support of that position, evidence was introduced to show that in 1864, and subsequently, money of her separate estate, received from her father, was invested in the Boyer farm, and the deed therefor taken in her name; that about two years thereafter it was sold for three thousand six hundred dollars, a portion of which at least was paid to her and afterwards invested in the Robertson and Beddel farm, which in turn was sold, and with part of the proceeds the lot in controversy was acquired. The evidence as to these investments, reinvestments, etc., is quite voluminous; but, without referring thereto in detail, it is sufficient to say that it tended to sustain plaintiff's contention, and having been submitted to the jury under proper instructions, the result was a verdict in her favor. The only inference that can be drawn from the verdict is, that the jury found plaintiff's allegations of fact were true; viz., that the money of her separate estate, which had been several times invested and reinvested in real estate, was finally used in acquiring title to the lot in controversy from Jacob Newkirk in October, 1872, and that none of her husband's money or property was employed in making the purchase. Exception was taken to the admission of some of the evidence above referred to, and to instructions of the court in submitting the same to the jury. If it becomes necessary to do so, the specifications of error relating thereto will be considered hereafter.

The contention of the defendant Mary Gorman is, that in 1876 she became a *bona fide* purchaser for value of the lot in question at sheriff's sale, without notice of any resulting trust in favor of plaintiff. In support of that position, evidence was introduced to prove that the real estate in controversy was levied on and sold on executions based on three judgments against Joel C. Lance, two of which judgments in favor

of C. M. Swayze, Nos. 28 and 29, of March term, 1873, were entered December 4, 1872, nearly two years before the conveyance of Lance and wife to Klingerman, and by him to Mrs. Lance, the plaintiff; that at said sale Mary Gorman purchased the property in controversy for \$2,810, and the same was duly conveyed to her by the sheriff. Evidence was also introduced tending to prove that about the time of the conveyance of Lance and wife to Klingerman, and by him to Mrs. Lance, in 1874, and prior thereto, Lance was largely indebted, and suits had already been brought against him, etc. When the two Swayze judgments, above referred to, were entered, the title to the real estate in controversy appeared by the record to be in Joel C. Lance, the defendant in said judgments. The other judgment, in favor of Schrieber, was obtained after the conveyance to Mrs. Lance. It follows from what has been said as to the actual state of the record, etc., that if defendant's purchase at sheriff's sale in 1876 was without notice, actual or constructive, of Mrs. Lance's equitable title, resulting from the use of her money in effecting the purchase from Newkirk, the defendant acquired a good title. The question of notice thus becomes a controlling factor in this case, and the burden of proving it devolved on the plaintiff. In other words, it was incumbent on her to establish two propositions: 1. That she had an equitable estate in the property, resulting from the use of her own money in purchasing the same from Newkirk, anterior to the entry of either of the Swayze judgments, on which it was afterwards sold as the property of her husband; 2. That the purchaser at sheriff's sale had notice of that equitable title or resulting trust when she bought the property: *Fillman v. Divers*, 31 Pa. St. 429. As already stated, the verdict in plaintiff's favor necessarily implies an affirmative finding of the first proposition; and assuming for argument's sake that there was no error leading to that result, was there any evidence to warrant the jury in also finding the second proposition affirmatively? If there was not, the plaintiff failed to make out such a case as entitled her to a verdict, and defendants' eighth point for charge, viz., that "under all the evidence in the case the verdict must be for the defendants," should have been affirmed.

It is contended that the possession of the premises in dispute by plaintiff's tenants, at the time of the sheriff's sale, was constructive notice to the defendant of the terms of their tenure and also of the title of their lessor; that the defend-

ant, in obedience to the maxim *caveat emptor* is presumed to have inquired and informed herself in regard to the condition of the title she was about to purchase. Conceding that inquiry thus became a duty, what would have been disclosed by a reasonable performance of that duty? Defendant would have learned that the parties in possession were plaintiff's lessees, and that plaintiff claimed to own the property. An examination of the records would have disclosed the further fact that the evidence and only record evidence of her title was the deed of Klingerman and wife, recorded August 31, 1874, more than a year and a half after the Swayze judgments, on which the property was about being sold, were entered, and further, that for nearly two years prior to the date of that conveyance the recorded title was in the name of plaintiff's husband, Joel C. Lance. Neither the deed of Klingerman and wife, nor anything in the regular path of inquiry, would have disclosed a trust in plaintiff's favor resulting from her having furnished out of her own separate estate the consideration of the conveyance to her husband by Jacob Newkirk in 1872. On the contrary, all the inquiry that defendant was reasonably required to make would have resulted in showing that plaintiff's title had its inception in the contemporaneous conveyances of herself and husband to Klingerman, and by the latter to her.

The principles of law applicable to constructive notice, duty of inquiry, etc., are clearly stated in several of our cases, among which are *Plumer v. Robertson*, 6 Serg. & R. 179, 185; *Woods v. Farmere*, 7 Watts, 382, 386; 32 Am. Dec. 772; *Dickinson v. Beyer*, 87 Pa. St. 274, 281; *Fillman v. Divers*, 31 Pa. St. 429. In the former, it is said: "Where a man is in possession, without making his title known, a prudent person would not purchase without making inquiry into that title; but where he who is in possession has placed upon record a title consistent with that possession, it may well be taken for granted that he holds under the recorded title, especially in this commonwealth, where every deed or writing affecting the title of lands may be, and ought to be, recorded." In *Woods v. Farmere*, 7 Watts, 382, 386, 32 Am. Dec. 772, it is said that a purchaser of land is not affected with constructive notice of anything which does not lie within the course of his title, or is not connected with it; that possession is notice of the possessor's title, but the registry by him of a particular title would restrict the generality of notice from possession. "The tenant's posses-

sion is notice of title in every form; the registry of a particular title is notice of that alone, and would be useless for any purpose but to restrict the generality of the notice from possession. It is therefore an indication that the occupant has narrowed his general to specific notice; and were he not bound by it, he might with impunity do an act to mislead one who is presumed to have used every means of information accessible to him, so far as the security of his title is concerned, but no further. . . . Though a judgment creditor be not a purchaser within the recording acts, a purchaser under his judgment has all the qualities of one, by relation, from the date of the lien; and his title, being thus of record and contemporaneous with the judgment, is paramount to all conveyances or encumbrances subsequently attempted": *Woods v. Farmere*, 7 Watts, 382, 386; 32 Am. Dec. 772.

The notice, "To Purchasers and Bidders," read at the sheriff's sale, that the property therein described "is not the property of Joel C. Lance, as whose property it is advertised to be sold, but is the sole and separate property of Anna Lance, and any person buying the same at this sale will acquire no title," is silent as to the fact, now relied on by the plaintiff, that her equitable title antedated the Swayze judgments on which the property was sold. That fact is not even suggested in the written notice, and, in the absence of anything tending to convey such information, the assertion in the notice that the property offered for sale "is the sole and separate property of Anna Lance," is referable alone to the deed of David H. Klingerman and wife to her, executed after the Swayze judgments were entered against her husband. As notice of the anterior resulting trust and equitable title in Mrs. Lance, the paper read at the sheriff's sale was no more effective than the constructive notice arising from the possession of her tenants at the time of the sheriff's sale. They were both sufficient to put purchasers on inquiry; but in either case, that inquiry would not necessarily lead to anything more than a knowledge of the Klingerman deed, which she had put upon record as the origin of her title.

There appears to be nothing in the evidence to warrant the jury in finding that Mrs. Gorman purchased with either actual or constructive notice of a resulting trust in favor of Mrs. Lance, or that the latter had any interest whatever in the property in controversy prior to the conveyance of Klingerman and wife in 1874. We are therefore of opinion that defend-

ants' eighth point for charge should have been affirmed, and the jury thereby instructed "that under all the evidence in the case the verdict must be for the defendants."

This view of the case renders a consideration of other questions presented by the specifications of error unnecessary.

Judgment reversed.

JUDGMENT LIEN. — A docketed judgment has priority and precedence over conveyances subsequently executed and equities subsequently attaching: *Martin v. Martin*, 7 Md. 368; 61 Am. Dec. 364, and note; *Trapnall v. Richardson*, 13 Ark. 543; 58 Am. Dec. 338; *Sanford v. McLean*, 3 Paige, 117; 23 Am. Dec. 773; and even over prior unrecorded deeds of which the judgment creditor had no notice: *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541; 19 Am. St. Rep. 259, and note. Compare *Wilkins v. Bevier*, 43 Minn. 213; 19 Am. St. Rep. 238, and note.

POSSESSION OF PROPERTY AS NOTICE OF TITLE. — Possession of land by a tenant is notice to a judgment creditor of such occupant's rights and interests in the land, and also of the occupant's landlord's title and interests: *Wilkins v. Bevier*, 43 Minn. 213; 19 Am. St. Rep. 238, and note. Compare *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541; 19 Am. St. Rep. 259, and note; *Anderson v. Brinser*, 129 Pa. St. 376

BURSON v. FIRE ASSOCIATION OF PHILADELPHIA.

[136 PENNSYLVANIA STATE, 267.]

INSURANCE COMPANY ESTOPPED TO DENY THAT INSURED OWNED PROPERTY WHEN. — Where a person, after candidly stating to a representative of an insurance company what his title to property is is advised by such representative to insure the property, in which he has an interest, in his own name as owner, and acts upon this advice, the company will be estopped from defending an action on the policy on the ground that his interest in the property does not amount to ownership.

INSURED MAY ASSUME NEW POLICY TO BE LIKE OLD ONE WHEN. — If an agent of an insurance company in arranging with an owner of goods for a renewal of a policy thereon informs such owner that he will make him another policy like the first one, but that the company will only give him a receipt, and not make a new policy for him, the insured has a right to suppose that a policy afterwards delivered to him under this arrangement is essentially similar to the original policy; and he will not be bound by a warranty clause in it that he did not know of, and which was not in the first policy.

SOLE AND UNCONDITIONAL OWNER OF INSURED PROPERTY, WHO IS. — A person in whom the entire legal title to property is vested at the time an insurance thereon is effected is the sole and unconditional owner thereof within the meaning of the policy, notwithstanding the insured had made a lease or bill of sale of the property, reserving title until full payment of the consideration; and the insurer has no standing to assert that the transaction was a legal fraud. The insured may recover from the company the full amount named in the policy upon the destruction of the

property by fire, although the lessee had partly paid for them, as such payment did not transfer to him the title *pro tanto*.

ASSIGNMENT OF ERROR NOT CONSIDERED WHEN. — An assignment of error to the admission of testimony which does not give the offer made nor the substance of the testimony admitted under it, and does not show any exception sealed, although it quotes the objections made to the admission thereof, will not be considered.

DEBT. The objection to the assignment referred to in the last paragraph of the opinion was, that it did not quote the offers of testimony, the substance of the testimony admitted thereunder, or the bills of exception. The other facts are stated in the opinion.

S. Holmes and Furman Sheppard, for the appellant.

J. B. Storm, for the appellee.

PAXSON, C. J. This was an action of debt in the court below upon a policy of fire insurance issued by the appellant company to Stroud Burson upon a stock of merchandise contained in a building in Stroudsburg. The policy was for the sum of three thousand dollars, and it was not denied that the loss exceeded that amount, nor was it alleged that there was the slightest taint of fraud about the transaction. The defense of the company is purely technical.

Among the warranties and conditions set forth in the policy, and to which the written contract is alleged to be subject, are the following: If the assured is not the sole and unconditional owner of the property; or if the interest of the assured in the property, whether as owner, trustee, factor, agent, or mortgagee, lessee, or otherwise, is not truly stated in this policy; or if any change take place in the title, interest, or possession of the property, etc.,—this policy shall become void, unless consent in writing is indorsed by the association hereon. It is proper to say here that this policy, while not so in form, was practically a renewal of a former policy between the same parties, and covering the same stock of goods, which original policy contained no such condition. Upon this point the uncontradicted evidence is, that Mr. McIlhaney, the agent of the company, called at the store where the insured property was, and asked whether W. S. Flory (who had charge of the insurance) wished to continue the insurance. Mr. Flory replied that he did, whereupon he said: "I will make you another policy like the first one, only I will make it so that hereafter, if you continue, we will only give you a receipt; do not have

to make a new policy for you." The only object of this change, apparently, was to enable the insurance to be renewed thereafter by receipt, instead of issuing a new policy for each renewal. It may well be questioned, under this state of facts, whether there was really any change in the conditions of insurance. It would certainly have been proper for the agent, when he proposed to give the assured a new policy "like the first one," to have informed him of any change of importance in the conditions. The assured had a right to suppose there was no essential difference between the policies, and the case does not come within the ruling in *Susquehanna etc. Ins. Co. v. Swank*, 102 Pa. St. 17, where it was held that a person who accepts a policy, and retains it for sixteen months, without reading it, cannot, after enjoying its protection during all that time, defend against an assessment upon the ground that the policy was issued upon a different plan from the one which he had verbally requested. We think the learned judge was justified in admitting the first policy in evidence, and in his instructions to the jury thereon.

The principal defense set up by the company was, that the assured was not the sole and unconditional owner of the property covered by the policy.

There are certain facts which I understand to be undisputed. They may be briefly stated thus: *a.* That there was no written application; *b.* That the original policy contained no warranty clause; *c.* That the assured had an insurable interest in the property destroyed; and *d.* That the property destroyed exceeded in value the amount for which it was insured. Nor was there any dispute about the facts relating to the plaintiff's title, or the manner in which he held the title and effected the insurance. For convenience, I take them as I find them condensed in the charge of the learned judge: At the time the policy of insurance was made, the plaintiff represented and stated to the defendant's agent that he had purchased the property of Simeon Flory; that he had entered into an agreement with W. S. Flory for the sale of the goods; that by the agreement the goods were to remain in the same place where the defendant had previously insured the same; that W. S. Flory was to have the use of the goods in his business, and pay for such use a rent equal to the annual interest on the amount paid by Stroud Burson for the goods, and also to keep the same insured, and keep up the stock to what it was when the plaintiff bought the same, and when the last

dollar of purchase-money was paid to the plaintiff he was to make a bill of sale to W. S. Flory, but until the whole sum was paid the goods were to remain the property of the plaintiff, and to be under his control; that the defendant's agent, on this statement of the plaintiff's interest made to him, said the proper way to insure the goods was in the name of the plaintiff; that at the time of making said policy and the several renewals, the agent inquired whether the same original arrangement continued, and was informed by the plaintiff that it did, and that said W. S. Flory had made a payment or payments on the said agreement to the plaintiff; that, the year before, said goods were insured by plaintiff in policy No. 82,245, which expired on February 2, 1882, whereupon the defendant agreed to insure the property for another year in a policy like No. 82,245, with the explanation that thereafter the same was to be continued by renewal receipts; that the interest of the plaintiff in the goods mentioned in the policy was correctly stated to defendant's agent at the time of the original contract of insurance, and if the same was not correctly set forth in the original policy, such neglect was the act of the defendant; and that there was no subsequent change of title, interest, or possession.

Nor was there any dispute as to Thomas M. McIlhaney having been the agent of the defendant company, with power to act for said company in Stroudsburg and vicinity, in receiving proposals for insurance, issuing and countersigning policies, assenting to assignments, collecting premiums, etc. It is true, the statement of the learned judge that the said agent was "clothed with more than the usual powers given by insurance companies to what are called local agents" was not only criticised by the learned council for the company, but was assigned as error. See eighteenth assignment. But if we concede that the power of the agent was too strongly stated by the court, Mr. McIlhaney had ample authority to bind the defendant. For the purposes of this case, we must consider Mr. McIlhaney as the company.

We have, then, the case of a person who goes to the company, and fully and candidly explains the condition of his title, and is informed by its officers or its agent, it matters not which, that the proper way to insure his property is in his own name, as owner. He takes out his insurance in the manner he was advised, pays the premium on it for years, and then, after his property is destroyed by fire, he is con-

fronted by a clause in his policy requiring him to be the sole and unconditional owner of the property, a clause which was not contained in his first policy, and which he had no reason to suppose was in the policy which had been substituted for it, and which he was told by the agent was to be "like the other." Surely, if such a defense is to prevail, insurance has ceased to be an indemnity.

I am, however, unable to see why the plaintiff was not the sole and unconditional owner of the property insured, within the meaning of the policy. The evidence is not disputed that the entire legal title to it was in the plaintiff at the time the insurance was effected, and that by the very terms of the lease or bill of sale, by whatever name it may be called, from the plaintiff to Flory, it was stipulated that the ownership should remain in the plaintiff until the last dollar was paid. It was urged, however, by the company that this transaction was a legal fraud, with the effect of making the property liable to execution on the part of the creditors of Flory; in other words, that Flory was the real owner of the property, while the plaintiff only held a bill of sale, unaccompanied by possession, and therefore worthless in law. Upon this theory the defense has been principally constructed. That it will not bear examination is apparent. The insurance company is not a creditor of Flory. It has no standing to assert that the transaction is a legal fraud. It is good between the parties; it is good against all the world, except creditors of Flory, if there be any, intended to be defrauded. As between the plaintiff and Flory, and as between the plaintiff and the insurance company, the title was in the plaintiff. The fact that Flory had made payments on account to the plaintiff did not give title *pro tanto* to Flory. This is because they had agreed that it should not; that until the last dollar was paid, the title was to remain in the plaintiff. In the mean time, the goods remained the property of the plaintiff, and when destroyed by fire, the loss was his. He must hand over the goods to Flory when the last payment is made, or if that is not possible, owing to their destruction, he must return him the money he has paid. The contract between the plaintiff and Flory must be executed as they made it, so long as it is not interfered with by some one who has the right to call its validity in question. I have endeavored to show that the defendant company has no such right. In this view of the case, we do not think it was error to instruct the jury that

they might find a verdict not exceeding the amount of the policy, three thousand dollars. See the twenty-first assignment. It is true, this instruction is inconsistent with that contained in the answer to the defendant's eighth point, but as no possible injury could have resulted to the defendant therefrom, we forbear further comment.

The first assignment alleges error in the admission of the testimony of Lewis M. Burson and W. S. Flory as to conversations with Thomas M. McIlhaney, the agent, at the time the insurance was effected. The ground of the objection was, that the agent was dead, and the witness on the stand, W. S. Flory, was a party in interest. It is a sufficient answer to this assignment to say that it does not conform to the rules. Fortunately, in this instance, the omission has not prejudiced the defendant's case.

I notice nothing in the remaining assignments that is not covered by what has already been said.

Judgment affirmed.

INSURANCE COMPANY, ESTOPPEL OF, TO DENY OWNERSHIP OF ASSURED IN PROPERTY INSURED. — Where any fact which would constitute a breach of a condition precedent to any liability of the company on the policy of insurance is fully known to its agent, local or general, who is authorized to consummate the contract of insurance, the agent's knowledge is the knowledge of the company, and his act in executing the policy, as a valid, completed contract, is an exercise of the power of the company, and constitutes a waiver by it of such condition precedent, estopping the company from claiming a forfeiture for breach of condition: *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233. And this rule applies to applications for insurance made out by or at the instance of the agent in which he causes the applicant to state that he owns the property, when he has been truly informed of facts by the applicant which show that he is not the owner in fee: *Deitz v. Insurance Co.*, 31 W. Va. 851; 13 Am. St. Rep. 909, and note; *Baker v. Ohio Farmers' Ins. Co.*, 70 Mich. 199; 14 Am. St. Rep. 485, and note; *Butz v. Ohio Farmers' Ins. Co.*, 76 Mich. 263; 15 Am. St. Rep. 316, and note.

INSURANCE — OWNERSHIP OF PROPERTY. — An absolute interest in property is an interest which is so completely vested in the individual that he cannot be deprived of it without his consent: *Hough v. City Fire Ins. Co.*, 29 Conn. 10; 76 Am. Dec. 581.

LAWRENCE'S ESTATE.

[186 PENNSYLVANIA STATE, 354.]

PERPETUITIES, RULE AGAINST, IN PENNSYLVANIA. — The rule against perpetuities, that no interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest, is in force in Pennsylvania, unaffected by statute, except as it is modified by the acts of 1853 and 1855, which operate only in restraint of accumulations.

CONFLICT OF LAWS — LEX REI SITÆ GOVERNS WHEN. — When the donee of a power of appointment by will of real estate situated in Pennsylvania dies domiciled in another state, having made such appointment, the validity of the appointment is to be determined by the law of Pennsylvania, which is the *lex rei sitæ*.

RULE AGAINST PERPETUITIES APPLIES TO POWER AS WELL AS TO APPOINTMENT. — Where a power of appointment is given either by deed or by will, the rule against perpetuities applies as well to the power as to the appointment, and if the power can be exercised at a time beyond the limits of the rule, it is bad; but when it must be exercised, if at all, within the legal limit, it is not rendered bad by the fact that, within its terms, an appointment might possibly have been made which would be too remote.

REMOTENESS OF ESTATE CREATED BY APPOINTMENT MEASURED FROM CREATION OF POWER WHEN. — A power of appointment to be exercised by will only must be regarded as special, and therefore the remoteness of the estate created by the appointment must be measured from the time of the creation of the power.

APPOINTMENT FOR LIFE OF APPOINTEE VALID, THOUGH REMAINDER TOO REMOTE. — When the donee of a power to appoint by will appoints in trust for life tenants to take at his death, with remainder over, such appointment for life will be good, whether the appointees were born before or after the creation of the power, and that although the estate in remainder may be too remote.

RULE AGAINST REMOTENESS SATISFIED IN CASE OF APPOINTMENT OF ESTATE IN REMAINDER WHEN. — If an estate in remainder appointed by a donee of a power of appointment by will is vested at his death, its enjoyment being merely postponed until the determination of a preceding vested estate for life, the rule against remoteness, which has regard to the time when the estate vests, is satisfied.

DONEE OF POWER OF APPOINTMENT MAY DECLARE TRUSTS FOR LIFE WITH REMAINDER OVER. — Where an unrestricted power of appointment by will is given, the donee, observing the rule against remoteness, has power to appoint the fee to trustees for the benefit of certain persons for life, with remainder over in fee.

PETITION. The opinion states the case.

John G. Johnson and William A. Manderson, for the appellants.

E. Spencer Miller, for *Ann E. A. Griffin* and the Union Trust Company, appellees.

J. Howard Gendell, for the New York Baptist Union etc., appellee.

CLARK, J. John Lawrence died domiciled in the city of Philadelphia in the month of March, 1847. By his last will and testament he devised all his real and personal estate to certain persons therein named, in trust, to pay over the net income, during her lifetime, to his daughter, Ann Appleton; to assign the real estate, upon her decease, in fee to the appointees of her last will; or failing such appointment, to pay over the same to and amongst her then living children, and the issue of children then deceased.

The trustees named in the will were removed by the orphans' court of Philadelphia County during the lifetime of Ann Appleton, and George W. Appleton and Henry Pomerene were duly appointed trustees in their place. All the property, except certain real estate in Philadelphia, was lost by the devastavit of the original trustees, the remaining property being known as No. 43 South Second Street, No. 221 Arch Street, and Nos. 1127 and 1129 Pine Street.

Ann Appleton, the donee of the power, died in March, 1883, domiciled in the state of New Jersey, leaving to survive her certain children, all of whom, it is conceded, were born during the lifetime of John Lawrence. By her last will and testament, in writing, which was afterwards duly probated, she devised to George W. Appleton, and in the event of his renunciation or decease, to the Philadelphia Trust etc. Company, certain property of her own, in Haddonfield, New Jersey, and also all that remained of the property over which she held the power of appointment under the will of John Lawrence, deceased, specifically referring thereto, in trust, to care for the same and collect the income thereof during the joint lives of her children, all of whom, as we have said, were living at the death of John Lawrence; to pay out of such income and the proceeds of sale of the Haddonfield property, if sold under the authority given, certain annuities mentioned, during that period, and after the expiration of said joint lives, to transfer the *corpus* of the property to the New York Baptist Union for Ministerial Education, which is the corporate name of what is known as the Rochester Theological Seminary.

George W. Appleton died December 1, 1886, and the Philadelphia Trust etc. Company having renounced the trust, the office of trustee under the appointment in the will of Ann Appleton became vacant; whereupon Ann Eliza Griffin, one of

the annuitants for life, presented her petition for the appointment of a successor to the trust created by the donee of the power. The appellants resisted this application, alleging that the execution of the power by Ann Appleton was invalid, and that Mrs. Griffin had therefore no standing in court to ask for the appointment of a trustee, the estate having passed to those entitled in remainder under the will of John Lawrence, deceased, as if Ann Appleton had died intestate. Their contention is, — 1. That the appointment violates the rule against perpetuities, and is therefore wholly void; and 2. That whilst the donee of the power, by its terms, could make a direct, immediate, and absolute appointment of the fee, she was not authorized to declare uses and trusts as contained in her will.

The rule, as stated in Gray on Perpetuities, is as follows: "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." This rule is in force in all of the states where the principles of the common law prevail, excepting as it may have been modified by statute. In Pennsylvania it is unaffected by statute, only as it is modified by the acts of April 18, 1853, section 9, and April 26, 1855, section 12, which were suggested by the Thelluson act, and operate only in restraint of accumulations. It seems to be conceded, and rightly too, we think, that although Ann Appleton was domiciled at her death in New Jersey, the validity of the appointment, if there should be any conflict, is to be determined by the laws of Pennsylvania, which is the *lex rei sitæ*; any inquiry as to the law of New Jersey is therefore rendered unnecessary. The rule as stated applies to interests in realty or in personalty, whether legal or equitable, but has no application to an interest which is vested, for a vested interest by its very nature cannot be subject to a condition precedent.

So, also, where a power of appointment is given, either by deed or will, the rule applies as well to the power as to the appointment. If a power can be exercised at a time beyond the limits of the rule, it is bad. As in the case at bar, however, the power must be exercised, if at all, in the lifetime of Ann Appleton, a life in being at the time of its creation, it cannot be impeached upon that ground; and although the power, to be exercised by will only, is in the most general terms, it is not rendered bad by the fact that, within its terms,

an appointment might possibly have been made which would be too remote: Gray on Perpetuities, sec. 510. The direct and specific object of the power, according to its terms, is not to create a perpetuity; and as the exercise of it is necessarily according to a certain discretion or latitude of choice in the donee, the security which the law provides against the violation of the law of remoteness is in the failure of any disposition which results from the abuse of that discretion: Lewis on Perpetuity, 487. The question, therefore, is upon the validity of the appointment which was in fact made.

As a general rule, whether an appointment made in execution of a power is too remote depends upon its distance from the creation of the power, and not from its execution: Gray on Perpetuities, sec. 514; Lewis on Perpetuity, 484. The exception is, when the power is general to the donee to appoint to whomsoever he may choose, either by deed or will; in such case, the donee has absolute control as if he had the fee, since he can appoint as well to himself as to any other person; he is practically the owner. In such case, the degree of remoteness is measured from the time of the exercise of the power, and not from the time of its creation: *Bray v. Bree*, 2 Clark & F. 453; Sugden on Powers, 394, 683; Lewis on Perpetuity, 483; Gray on Perpetuities, secs. 477-524; *Mifflin's Appeal*, 121 Pa. St. 205; 6 Am. St. Rep. 781. But it will be seen that the power given to Ann Appleton is a power to be exercised by will only; her authority is not commensurate with the entire ownership; she could not appoint to herself, nor to any other person to take in her lifetime. She had not the absolute control; and although the decisions are somewhat conflicting, and the question not free from doubt, the better opinion seems to be that the power must be regarded as special, and therefore the remoteness of the estate created by the appointment must be measured from the time of the creation of the power, which was at the death of John Lawrence: See *In re Powell's Trusts*, 37 L. J. Ch. 188; Gray on Perpetuities, sec. 526, and cases there cited. No estate or interest can be limited under a particular power, which would have been too remote if limited in the deed or will creating the power: Lewis on Perpetuity, 488.

But assuming that the remoteness of the appointment depends upon its distance from the creation of the power, it is plain that the several bequests and annuities made in the last will and testament of Ann Appleton, deceased, were to persons named and in being for distinct and separable sums of money

by way of bequest or annuity out of the proceeds of her own and the income of the original trust estate.

The manifest purpose of the trust was to preserve the estate for the legatees and annuitants, for the life of her children and the survivor of them. At the death of the last child her surviving, this object would be fully attained; the annuities, whether to children, grandchildren, or to others, were then to terminate, and the entire trust estate then remaining was to be conveyed to the New York Baptist Union in fee, to be applied as by the will is directed. We have, then, a devise to the trustees, in trust for the annuitants, for the life of the children of the donee and the survivor of them, with a remainder over in fee to the Baptist Union. Ann Appleton, as the donee of the power, had the right by her will to appoint to whom she chose; she certainly had a right to appoint to her children for life, or to trustees for their use for life, whether they were born before or after the decease of John Lawrence; and that although the estate in remainder might be too remote, for the annuitants would take at her decease. "Where, under a power, interests are given by way of particular estate and remainder (including analogous gifts of personal estate), and the particular estate is limited to a valid object of the power, but the remainder is too remote, the appointment will not be wholly void, but only the gift in remainder. In such case, the interests, in respect of which there is an excess of the power, being distinct and separable from the valid portion of the appointment, there is no reason for involving the primary limitation in the remoteness of the remainder": Lewis on Perpetuity, 496; citing *Adams v. Adams*, Cowp. 651; *Bristow v. Warde*, 2 Ves. Jr. 336; *Routledge v. Dorril*, 2 Ves. Jr. 357; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382; *Butcher v. Butcher*, 9 Ves. 382; Gray on Perpetuities, secs. 232, 239, 242; citing *Read v. Gooding*, 21 Beav. 478; 4 De Gex, M. & G. 510, and other cases. See also *Davenport v. Harris*, 3 Grant Cas. 168. In this respect we think the ruling in *Smith's Appeal*, 88 Pa. St. 492, was wrong; for although Ryan's daughter, Mrs. Smith, might have had children born after his decease, her children, whether born before or after Ryan's death, would have taken at her death, and the life estates were therefore good, whereas it was held that her appointment was wholly bad. This statement of the law would seem to be decisive of the case at bar, for the proceeding is not by the party entitled in remainder for a conveyance, but by one of the annuitants for the appointment of a trustee

for the purposes of the trust subsisting under the will of Ann Appleton, for the benefit of the annuitants, during the life of her children.

But the estate of the Baptist Union also vested at the death of Ann Appleton. The beneficiaries under her will are described by name; to each is given a separate and distinct sum by way of legacy, or annuity, to each one *eo nomine*, and, as we have said, their rights vested at their mother's death. The remainder was ready, at any time after the death of Ann Appleton, to come into the possession of the Baptist Union whenever and however the life estate might determine; it was subject to no condition precedent, save the determination of the preceding estate; the contingency was not annexed to the gift, or to the person entitled, but to the time of enjoyment merely, and, according to all the cases, the remainder must be treated not as a contingent but as a vested estate. If this be so, the rule against remoteness is satisfied; for not only the particular estate, but the remainder supported by it, took effect within lives in being at the creation of the power. "The particular feature," says Mr. Lewis, in his treatise on perpetuities, "in limitations of future interests, with which the rule against perpetuities is connected, is the time of their vesting, or in other words, of their becoming interests transmissible to the representative of the grantee, devisee, or legatee, and disposable by him. When they are so limited as necessarily to allow this quality, within the legal period of remoteness, they are free from objection in reference to the perpetuity rule." Upon this question we may also refer to *Mifflin's Appeal*, 121 Pa. St. 205; 6 Am. St. Rep. 781. "If a remainder is vested, that is, if it is ready to take effect whenever and however the particular estate determines, it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being": Gray on Perpetuities, sec. 209. Perpetuities are grants of property wherein the vesting of an estate is unlawfully postponed: *Philadelphia v. Girard's Heirs*, 45 Pa. St. 26; 84 Am. Dec. 470; *Barclay v. Lewis*, 67 Pa. St. 316. The main question decided in *Smith's Appeal*, 88 Pa. St. 492, is therefore not involved in this case. The accuracy of that decision has been somewhat doubted by the learned judge who wrote it: *Coggins's Appeal*, 124 Pa. St. 10; 10 Am. St. Rep. 565; but the subject can only be further considered when a proper case is presented.

Nor do we think the appointment is invalid because in the

exercise of the power the donee, without special direction of John Lawrence, the testator, to that effect, in appointing the fee, declared certain uses and trusts for life, with remainder over. The power conferred upon Mrs. Appleton by her father's will was "to grant and convey the real estate in fee, . . . "in such parts or shares" as she, by her last will, should direct. The power is wholly unrestricted; the entire discretion is committed to the donee of the power to grant the fee in such form and to such persons as she chose. In the exercise of that power she did appoint the fee, and we think she was authorized, observing the rule against remoteness, to declare such uses and trusts for life as would best carry out her wishes with respect to the ultimate disposal of the property. No authorities have been cited to any different effect. On the contrary, appointments in trust, even under restricted powers, would seem to have been sustained, and as illustrations of this we have been referred to *Alexander v. Alexander*, 2 Ves. Sr. 642; *Trollope v. Linton*, 1 Sim. & S. 477; *Crompe v. Barrow*, 4 Ves. 681; *Willis v. Kymer*, L. R. 7 Ch. Div. 181; 2 Sugden on Powers, 273, 274.

The decree of the orphans' court is affirmed, and the appeal dismissed, at the cost of the appellants.

PERPETUITIES. — As to the rule against perpetuities as in vogue in the various states, see extended note to *Barnum v. Barnum*, 90 Am. Dec. 101-106; *Greenland v. Waddell*, 116 N. Y. 234; 15 Am. St. Rep. 400, and note; *Coggins's Appeal*, 124 Pa. St. 10; 10 Am. St. Rep. 565, and note; *Johnson v. Holifield*, 79 Ala. 423; 58 Am. Rep. 596, and note 599-601; *O'Hara v. Dudley*, 95 N. Y. 403; 47 Am. Rep. 53. For the Pennsylvania rule, see *City of Philadelphia v. Girard*, 45 Pa. St. 9; 84 Am. Dec. 470, and note.

RICE v. DAVIS.

[136 PENNSYLVANIA STATE, 439.]

AGENT CANNOT ENTITLE HIMSELF TO COMPENSATION FROM BOTH VENDOR AND VENDEE. — The rule that an agent for the sale of property cannot at the same time act as agent for the purchase thereof, or so interest himself therein as to entitle himself to compensation from both vendor and vendee, is a distinctly recognized rule of public policy, not intended to be remedial of actual wrong, but preventive of the possibility of it, and should be rigidly enforced, unless it appears that the persons for whose protection it is intended expressly agreed, with a knowledge of all the circumstances, to waive their rights under it. And if an agent of the owner of stock receives from a purchaser thereof compensation for his services in making the sale, the fact that he so received it with

the knowledge and without the objection of the vendor will not constitute a waiver of the rule and preserve the agent's right to be compensated by the vendor.

ASSUMPSIT. The facts appear from the opinion.

Henry W. Palmer, for the appellant.

Alexander Farnham and F. C. Mosier, for the appellee.

STERRETT, J. In reaching the conclusion embodied in their verdict, the jury must have found as a fact that plaintiff was employed by defendant to sell his stock in the Clear Spring Coal Company, and that he succeeded in doing so. If there was nothing else in the case, the judgment should be affirmed; but it was clearly shown by plaintiff's own evidence that he received from the purchasers, for his services in the matter, four shares of the stock, worth about four thousand five hundred dollars.

In view of that evidence, the defendant requested the court to charge that, "under the testimony of the plaintiff and his witnesses, the plaintiff received compensation from the purchasers of the Davis shares, and therefore cannot maintain this action for compensation from Mr. Davis." The plaintiff, on the other hand, asked the court to charge: "If the jury believe that Mr. Davis agreed to pay Dr. Rice a compensation for his services in effecting a sale of the interest of Mr. Davis in the Clear Spring Coal Company for forty-five thousand dollars, and that he effected a sale accordingly, at the price agreed on, he is entitled to recover the value of his services to defendant; and it being admitted by the defendant, and shown by documentary evidence in the case, that the defendant knew Dr. Rice was to receive four shares of stock from the purchasers, and the defendant consenting, the fact of Dr. Rice's receiving said shares does not operate to prevent the plaintiff's recovering."

These points were answered together, as follows: "If the jury find that Dr. Rice, under the agreement with Davis, made sale of the property at a price fixed by the defendant himself, and thereby entitled himself to compensation for his services rendered, then the fact that he received four shares of stock from the purchasers, in the manner described by the witnesses, and with the full knowledge of the defendant as to the nature of the transaction, would not prevent, in our judgment, his recovering in this action. We say further, in this connection, the evidence in this case shows that all the parties were

members of the same company; that De Witt and Cake knew that Dr. Rice was claiming a commission from Davis; and it also shows that Davis knew that Dr. Rice was to have four shares of the stock of the company. Knowledge of these facts by all the parties, without complaint or dissent at the time, and without any evidence of bad faith in the transaction, takes the case out of the class of cases to which we have been referred, where it has been held that an agent is not to be allowed compensation from both parties to a sale. With every disposition to recognize the force of the decisions to which the learned gentlemen have called our attention, we do not think that they apply to the case in hand, and control our charge on the legal questions involved, in the manner argued by defendant's counsel." This answer is an emphatic affirmance of the plaintiff's point, and a refusal to charge as requested by the defendant. It is contended that in so doing the learned judge unintentionally erred, and we think he did.

The principle underlying this case, that an agent for the sale of property cannot at the same time act as agent for the purchase thereof, or interest himself therein, and thus entitle himself to compensation from both vendor and vendee, is grounded on the infallible declaration that "no man can serve two masters." As a rule of public policy, it is distinctly recognized in our text-books on agency, and in numerous adjudicated cases, among which are *Everhart v. Searle*, 71 Pa. St. 256; *Pennsylvania R. R. Co. v. Flanigan*, 112 Pa. St. 558, and cases there cited. It forbids that any one intrusted with the interests of others shall in any manner make the business an object of personal interest to himself, because, from a frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interests at the expense of his principal. The various forms of agency to which the principle is applicable, and the reasons for upholding it, etc., are referred to in *Everhart v. Searle*, 71 Pa. St. 256. The controlling facts in that case were briefly these: Flagg, the owner of land, employed Searle to sell the same, and agreed to give him for his services all that he obtained over \$125 per acre. Searle found several applicants for the land, but he finally agreed to give Everhart the preference, for which the latter agreed to pay him five hundred dollars. Flagg and Everhart were brought together, and the sale was concluded. They each refused to pay Searle anything, because, by acting for both of them, he had undertaken to

serve two masters. Suit was then brought against Everhart, and judgment obtained for the five hundred dollars and interest. On behalf of the defendant in error, it was contended that Searle neither did nor contemplated any wrong against either vendor or vendee; that neither of them was induced to act by any false representation made by him; that Flagg got his price for the land, and Everhart secured the preference for which he was willing to pay five hundred dollars, and hence there was no error in permitting the plaintiff to recover. Referring to the position thus assumed, Chief Justice Thompson said there was plausibility and seeming force in the argument that Flagg, the plaintiff's principal in the sale, was not injured by the arrangement with the defendant, etc., but it is unsound. The transaction is to be regarded as against the policy of the law. It matters not that no fraud was meditated and no injury done. The rule is not intended to be remedial of actual wrong, but preventive of the possibility of it.

Further consideration of the principle or rule of public policy invoked by defendant is unnecessary. Its existence was not questioned by the learned judge of the common pleas. On the contrary, he was disposed to recognize the force of the decisions that were cited in support of it, but came to the conclusion that they did not apply to the case in hand, because, as he says, the evidence shows that all the parties were members of the same company; that De Witt and Cake knew that Dr. Rice was claiming commissions from Davis, and the latter knew that Rice was to have four shares of the stock; that knowledge of these facts by all the parties, without complaint or dissent at the time, and without any evidence of bad faith in the transaction, is sufficient to take the case out of that class of cases in which it has been held that an agent is not to be allowed compensation from both the parties to a sale. It is not by any means clear that all the facts thus assumed by the court were either proved or admitted, or that the jury would have been warranted in finding them to be true; but assuming, for the sake of argument, that they were conclusively established, they are at best only evidence that the parties assented to the arrangement, and agreed to waive the rule of public policy now insisted on by the defendant.

Conceding, for the sake of argument, that it would be competent for persons circumstanced as the parties in this case were to waive or suspend, by mutual agreement, the operation

of a rule of public policy, it cannot be successfully contended that such agreement may be inferred either from knowledge of the fact that such rule has been violated, or from silence or failure to dissent at the time, or from all these combined. Nothing short of clear and satisfactory proof of an express agreement to do so should be regarded as sufficient for that purpose. In the case at bar, there appears to be no evidence that would warrant either court or jury in saying that the rule now insisted on by the defendant was waived by him. He had a right to be silent, even if he knew that the plaintiff had undertaken to serve two masters, and intended to claim compensation from both. His own testimony explains why no objections were interposed.

For reasons above suggested, we are of opinion that the learned judge erred, not only in his answer affirming plaintiff's first point, but also in refusing to affirm defendant's second point for charge. Rules of law such as that under consideration, intended to be preventive of the possibility of wrong, rather than remedial of actual wrong, should be rigidly enforced, unless it clearly appears that the parties for whose protection they were intended have, with full knowledge of all the circumstances, agreed to waive their rights thereunder.

Judgment reversed.

REAL ESTATE AGENT ACTING FOR BOTH VENDOR AND VENDER MAY NOT COLLECT COMMISSION FROM EACH. — One acting as the broker of both parties in a sale or exchange of lands cannot be entitled to a commission from each party: *Raisin v. Clark*, 41 Md. 158; 20 Am. Rep. 66; note to *Barry v. Schmidt*, 46 Am. Rep. 37, 38; *Farnsworth v. Hemmer*, 1 Allen, 494; 79 Am. Dec. 756, and note 758, 759. But see *Rupp v. Sampson*, 16 Gray, 398; 77 Am. Dec. 416, and note. Compare note to *Potter's Appeal*, 7 Am. St. Rep. 279-283. An agent cannot represent both the seller and purchaser, for his duties in such a dual capacity would be more or less incompatible: *Webb v. Paxton*, 36 Minn. 532; note to *Walker v. Osgood*, 93 Am. Dec. 177, 178.

LIVINGSTON v. WOLF.

[136 PENNSYLVANIA STATE, 519.]

MUNICIPAL LEGISLATURE HAS POWER TO DETERMINE EXTENT TO WHICH SIDEWALKS MAY BE OBSTRUCTED. — The municipal authorities of a city or borough may determine the extent to which sidewalks and pavements may be obstructed by cellar doors, door-steps, awnings, projecting windows, cornices, and the like. This power must be exercised by regulations that are general and uniform, that are reasonable and certain, and that are in conformity with the constitution; and when so exercised, it is binding on all the inhabitants of the municipality.

BOROUGH ORDINANCE AUTHORIZING PROJECTION OF BAY-WINDOW ON STREET NOT UNREASONABLE WHEN. — A borough ordinance which prohibits the construction of any bay-window projecting into a street sixty feet wide more than twenty-eight inches, by clear and necessary implication permits the erection of a bay-window within that limit, and is not unreasonable; and under it a bay-window projecting into the street less than twenty-eight inches will not be enjoined.

INJUNCTION NOT GRANTED WHERE PLAINTIFF SHOWS NO APPRECIABLE INJURY TO HIMSELF. — In a suit by an adjoining lot-owner to enjoin the erection of a bay-window projecting into the street, an injunction will not be granted, where it is not shown that the plaintiff would suffer any appreciable injury from the structure sought to be enjoined.

BILL in equity. The facts are sufficiently stated in the opinion.

W. J. Shearer, F. E. Beltzhoover, and S. Hepburn, Jr., for the appellant.

A. D. B. Smead, William Trickett, and John B. Landis, for the appellee.

WILLIAMS, J. The principle that matters of merely local concern should be left to the control of the people to be affected is recognized and acted upon in our system of government. To this end cities and boroughs have their legislative as well as their administrative officers, and the municipal legislature may make laws in regard to all subjects of a municipal character, and enforce them by appropriate penalties. The local government must keep within the limits that bound its jurisdiction as they are defined by the constitution and laws of the state; but, subject to these restrictions, it may determine what is best calculated to promote the security, the comfort, and the convenience of the inhabitants. Among the subjects of municipal control is that of the opening, vacating, and management of streets and alleys. The city or borough may decide when and where it will open streets, what shall be their width, and how much of that width shall be devoted to a carriage-

way, and how much to foot-walks. It may say where trees shall be planted within the street limits, where and how hitching-posts shall be set, telegraph-poles erected, or passenger-railways built. Its decision in such matters may subject a few persons to some inconvenience, or possibly to some substantial loss, but it has the power to decide on such subjects. The foot-ways no less than the carriage-ways are under municipal control, and the authorities may determine the extent to which the walks and pavements may be obstructed by cellar doors, door-steps, awnings, projecting windows, cornices, and the like. This power must be exercised by regulations that are general and uniform, that are reasonable and certain, and that are in conformity with the constitution and laws. When so exercised, it is binding on all the inhabitants of the municipality. These general propositions are supported by many cases, among which are *Paul v. Carver*, 26 Pa. St. 223; 67 Am. Dec. 413; *Commonwealth v. Rush*, 14 Pa. St. 186; *Barter v. Commonwealth*, 3 Penr. & W. 259; *Philadelphia's Appeal*, 78 Pa. St. 33; *Allegheny v. Zimmerman*, 95 Pa. St. 287; 40 Am. Rep. 649; *Commonwealth v. Hauck*, 103 Pa. St. 536; *In re Ruan Street*, 132 Pa. St. 257. That the courts must judge of the reasonableness of the action of the municipality, and that such action is not binding if it is unreasonable, was held in *Kneidler v. Norristown*, 100 Pa. St. 368; 45 Am. Rep. 384; and that its action must be general, bearing equally upon the citizens, was ruled in *Reimer's Appeal*, 100 Pa. St. 182; 45 Am. Rep. 373.

In this case the obstruction complained of is a window projecting from the second story of defendant's dwelling into the street. The plaintiff alleges that the obstruction is unlawful, and asks that it may be prevented by an injunction. The defendant sets up a borough ordinance as his authority for building the window, and denies that it inflicts any substantial injury upon the plaintiff. The controlling question, therefore, is, whether the borough of Carlisle has authorized the construction of the window. If it has, the decree appealed from was rightly made. If it has not, then the extent of the plaintiff's injury, and the other questions raised, must be considered.

It is not denied that an ordinance was duly passed by the borough council on the 20th of May, 1852, relating to this subject. It provided, among other things, that all porches, cellar doors, and door-steps should be so built as not to extend into any street having a breadth of sixty feet beyond four feet

three inches, or a proportional distance in narrower streets. It also prohibited the construction of "any bulk or jut window" projecting into the street more than twenty-eight inches. In 1869 this ordinance was amended so as to reduce the distance that a cellar door might extend into the street to three feet nine inches, and that for door-steps to three feet six inches; but the provision for "bulk or jut windows" remained at twenty-eight inches. The master finds that the defendant's window extends but twenty-seven and one half inches over the street line. It is therefore within the limit fixed by the ordinance, and as to the public, within its protection. It is true, the ordinance does not expressly declare that lot-owners may occupy three feet nine inches of the street with their cellar-ways, or project their jut or bay windows to a distance of twenty-eight inches over the street; but by forbidding the extension of such structures beyond a fixed limit it does, by clear and necessary implication, permit their erection within that limit. The window is therefore not an unlawful obstruction of the street, but a projection authorized by the ordinance of 1852.

In *Reimer's Appeal*, 100 Pa. St. 182, 45 Am. Rep. 373, an injunction was granted restraining the erection of a projecting window, but it was because no valid municipal authority was shown for building it. An individual permit had been granted, but it was held that the use of the streets for such purposes must be regulated by rules of general and uniform application. The power to make such rules was not denied, but was clearly recognized. The principles that control this case may be stated thus:—

1. Cities and boroughs have the power to permit, under regulations that are reasonable in character, and general in their application, the use of a portion of the highways for approaches to and for ornamental work upon buildings standing on the street line.

2. The borough of Carlisle has exercised this power by the ordinance of 1852, which is reasonable in its provisions, and general in its application.

3. The window complained of is within the limit of projection fixed by the ordinance, and it is consequently within its implied permission.

It follows that the projecting window is not an unlawful obstruction, but a lawful structure. If this conclusion could be regarded as doubtful, the decree ought nevertheless to be

affirmed upon the finding of the master that the window caused no appreciable injury to the plaintiff.

The decree is affirmed, the costs to be paid by the appellant.

MUNICIPAL CORPORATIONS. — The mayor and aldermen of a city are clothed with legislative powers, and empowered to adopt measures of police: *Baker v. Boston*, 12 Pick. 184; 22 Am. Dec. 421; and have power to make rules and regulations regarding the erection and maintenance of balustrades and other projections upon the roofs or sides of buildings: *Cushing v. Boston*, 128 Mass. 330; 35 Am. Rep. 383, and note 386, 387; note to *State v. Berdella*, 38 Am. Rep. 127, 128.

NUISANCES — ABATEMENT BY PRIVATE PERSON. — A private person can only abate a public nuisance when he shows that he is specially injured by its existence: *Steamboat Co. v. Railroad Co.*, 30 S. C. 539; 14 Am. St. Rep. 923, and note; *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813. See note to *State v. Berdella*, 38 Am. Rep. 128, for an instance of where a plaintiff was not permitted to restrain defendant, his neighbor, from maintaining a wooden awning in front of his premises.

LOGAN v. GARDNER.

[186 PENNSYLVANIA STATE, 588.]

MARRIED WOMAN CAN ONLY PASS HER TITLE TO LAND IN STATUTORY MODE.

— A married woman can only pass her title to real estate in the statutory mode; and therefore a party claiming under a deed from her and her husband, which is alleged to be lost, must show that it was executed and acknowledged as required by the statute.

DISABILITIES OF COVERTURE AND INFANCY ARE SEPARATE AND INDEPENDENT, and the mere fact that they both occur in connection with the same act does not give either of them any greater force than it would have had separately. If, therefore, an infant *feme covert* has executed a deed properly, the only objection the party relying on it has to meet is that of infancy.

DEED OF INFANT IS VOIDABLE ONLY; the title passes by it, and remains in the grantee until some clear act of disaffirmance is done by the grantor after coming of age, and he may affirm it by much less formal acts than would be sufficient to avoid it, and clearly by any act which amounts to an estoppel.

MARRIED WOMAN OF FULL AGE WHO BECOMES DISCOVERT MAY BE ESTOPPED by her acts, the same as other persons *sui juris*.

ENCOURAGEMENT OF IMPROVEMENT NOT NECESSARY TO ESTOP WHEN. —

Where a person while under disability makes a deed, voidable because so made, and the grantee, after the removal of the grantor's disability, with the latter's knowledge, makes expenditures by placing improvements on the land, it is not necessary, to estop the grantor from disaffirming the deed, to show that he positively encouraged the improvements.

EJECTMENT. The facts appear from the opinion.

D. I. Ball, Charles H. Noyes, Watson D. Hinckley, William W. Wilbur, William Schnur, and Mr. Thompson, for the appellant.

H. H. Goucher, W. V. N. Yates, and James O. Parmlee, for the appellee.

MITCHELL, J. The defense was a deed from plaintiff and her husband, to which the reply was,—1. A denial of the making of any deed; and 2. Infancy at the date of the alleged execution. To this second point, the defense rejoined acts of ratification by estoppel. The cardinal facts, therefore, upon which the jury had to pass were, the execution of the alleged lost deed, the infancy of plaintiff at that time, and the acts of estoppel.

As a married woman, the plaintiff could only pass her title in the statutory mode. A disability imposed by law cannot be set aside or evaded indirectly by acts of the party: *Glidden v. Strupler*, 52 Pa. St. 400; *Grim's Appeal*, 105 Pa. St. 375; *Stivers v. Tucker*, 126 Pa. St. 74. The learned judge therefore correctly instructed the jury that if defendant had not proved the making and acknowledgment of the deed as required by the statute, they need not go further, but should return a verdict for plaintiff.

The appellant's third and fourth specifications of error complain that too strict a measure of proof was required as to the contents of the lost deed, and that proof of the certificate of acknowledgment alone was sufficient until the certificate was called in question. But the present contention would be more tenable if appellant had asked the court to say specifically that proof of the certificate was sufficient *prima facie* proof of the execution of the deed and of its contents, so far as they were recited therein. If the deed had been produced, it would have been necessary to show that it contained all the requisites for the conveyance of plaintiff's title; and a party claiming under a lost deed must be held to proof of the same requisites: *Krise v. Neason*, 66 Pa. St. 253. The general effect of the charge on this point was correct, and we do not think the jury could have been misled in any way by it. The third and fourth assignments of error are not sustained.

The disabilities of coverture and infancy are separate and independent, and the mere fact that they both occur in connection with the same act does not give either of them any greater force than it would have had separately. If a deed

duly acknowledged had been produced, it would have made an end of the question of coverture in the case, and proof of the deed to the satisfaction of the jury would be equivalent to its production. The statute makes no distinction between *femes covert* of full age and those under age; its requirements are the same for all. If, therefore, the jury were satisfied that a deed had been made by plaintiff, the objection of coverture was avoided, and defendant had only to meet that of infancy.

The effect to be given to an infant's deed was long the subject of controversy, but the decided weight of authority now is, that is voidable only; that the title passes by it, and remains in the grantee until some clear act of disaffirmance is done by the grantor after coming of age. The different views are discussed by Strong, J., in *Irvine v. Irvine*, 9 Wall. 617, 627, and the authorities are well collected in 10 Am. & Eng. Ency. of Law, tit. Infants, pp. 649, etc. The law makes no distinction between the deeds of infants on account of sex; nor, as already said, is the disability of coverture made any greater or any different by the additional disability of infancy. They remain separate and distinct. The *dictum* of Chief Justice Gibson in *Schrader v. Decker*, 9 Pa. St. 14, 49 Am. Dec. 538, that the deed, "being executed while the wife was an infant, is absolutely void," must therefore be referred to the unsettled position of the law at that time. The modern authorities are clearly the other way. The cases also show that the infant may affirm his deed by much less formal acts than would be sufficient to avoid it, and clearly by any act which amounts to an estoppel: *Irvine v. Irvine*, 9 Wall. 617, 627; *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; *Bostwick v. Atkins*, 3 N. Y. 53; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318; *Wallace v. Lewis*, 4 Harr. (Del.) 75; *Tunison v. Chamblin*, 88 Ill. 378, 386; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221. The acknowledgment and certificate, even if in the strict statutory form, would not estop a *feme covert* from showing her infancy at the time: *Williams v. Baker*, 71 Pa. St. 476. But when it is said in that case that she could not ratify a deed after coming of age, except by a reacknowledgment in the mode prescribed by the statute, this must be understood as limited to ratification during coverture. As soon as she becomes discovert, and of full age, she stands in the same position in regard to acts of estopped *in pais* as other persons *sui juris*. In the present case, the plaintiff, in 1879, being then of full age, left her husband on account of his treatment,

for which she subsequently obtained a divorce. The judge charged the jury, and we must assume rightly upon the evidence, as that point is not now before us, that from 1879 to 1882 plaintiff was under no legal disability, and her acts and conduct, with regard to their effect upon her title were those of an unmarried person, and of course of a person of full age. But, in answering the defendant's points, the jury were told that, before they could find an estoppel, they must be satisfied that the plaintiff, with knowledge of her rights, and of the improvements and expenditures being made on the premises, acquiesced in and encouraged such improvements. This presents the only substantial question in the case.

The doctrine of estoppel *in pais* has been very much expanded in modern times, particularly in Pennsylvania, where equitable principles are applied in actions at law. The cases are very numerous, but it is not necessary to refer to more than a few of them. In *Woods v. Wilson*, 37 Pa. St. 379, the subject was discussed by Chief Justice Thompson, and it was held that silence, in ignorance of one's own right or of another's expenditures, will not estop, but that mere silence, with knowledge, is evidence from which a jury may find an estoppel. See also *Hill v. Epley*, 31 Pa. St. 331, and *Mirantville v. Silverthorn*, 48 Pa. St. 147. These decisions rest on the ground that the circumstances were such as to raise a duty to speak, and that failure to do so is either a fraud, or would work such an injury as would be equivalent to a fraud, if the party should not be estopped. On the other hand, it was held as early as *Buchanan v. Moore*, 13 Serg. & R. 304, 15 Am. Dec. 601, and *Robinson v. Justice*, 2 Penr. & W. 19, 21 Am. Dec. 407, that positive acts of encouragement, or which help to mislead, will raise an estoppel, without any fraud, and irrespective of the party's knowledge of his own rights. And as was pointed out by Chief Justice Gibson, this result rests on a different principle; that, of two innocent parties, the one who occasioned the loss must bear it. See also *Chapman v. Chapman*, 59 Pa. St. 214; *Miller's Appeal*, 84 Pa. St. 391; and *Putnam v. Tyler*, 117 Pa. St. 570, 586. The distinction, therefore, between the cases where acts or declarations of encouragement are necessary to create an estoppel, and those where mere silence or acquiescence will be sufficient, is one of principle, and each case as it arises must be assigned to one or the other class, according to its circumstances, the chief of which is knowledge or ignorance of the party's own rights and the

other's action. Encouragement is necessary where the party is ignorant; but knowledge creates the duty to speak, and where that exists, silence is enough to estop.

The present case belongs in the class of *Woods v. Wilson*, 37 Pa. St. 379, where silence, with knowledge of expenditures being made by the party in possession, may be sufficient to create an estoppel. The learned judge put it into the other class, by charging the jury that there would be no estoppel unless the plaintiff encouraged the improvements. Into this he was no doubt led by plaintiff's sixth point, that a married woman cannot be estopped by improvements made by the vendee, even with her knowledge and encouragement. This was properly affirmed as to knowledge and encouragement during coverture; but the same phrase, thus unfortunately suggested, was no doubt inadvertently carried into the answers to points relating to estoppel by conduct after the disabilities of coverture had ceased. This tended to mislead the jury into supposing that something more than mere silence, something active or positive, on the part of plaintiff was necessary to estop her, and in so doing, it put a heavier requirement on defendants than the case justified. For this slip, in an otherwise clear and accurate charge, we are obliged to reverse the judgment.

Judgment reversed, and *venire de novo* awarded.

MARRIED WOMEN — CONVEYANCES. — That the conveyances of a married woman may be effectual, they must strictly comply with the statutes giving married women the power to make conveyances: *Hayden v. Moffatt*, 74 Tex. 647; 15 Am. St. Rep. 866, and note; *Cox v. Holcomb*, 87 Ala. 589; 13 Am. St. Rep. 79, and note; *Moulton v. Hurd*, 20 Ill. 137; 71 Am. Dec. 257, and note 259, 260. At common law, married women had no power to contract: *Crockett v. Doriot*, 85 Va. 240; *Howe v. North*, 69 Mich. 272; and when under a statute they are empowered to make conveyances, such conveyances must be executed and acknowledged in the exact manner provided by the statute: *Utzfield v. Bodman*, 76 Tex. 359.

MARRIED WOMEN — ESTOPPEL. — The doctrine of estoppel *in pais* applies to married women: *Brown v. Thompson*, 31 S. C. 436; 17 Am. St. Rep. 40, and note 47, 48; *Dobbin v. Cordiner*, 41 Minn. 165; 16 Am. St. Rep. 683, and note. In *Jackson v. Torrence*, 83 Cal. 522, it is decided that a married woman is not estopped in favor of a purchaser under a contract of sale signed by herself and husband, which she does not acknowledge, from claiming her separate estate in such property, by her mere failure to expressly notify the purchaser of such claim, or to inform him of the nature of her interest therein.

MARRIED WOMEN — INFANTS. — A deed executed by an infant *feme covert* pursuant to the statutory requirements with respect to conveyances by married women stands precisely on the same footing as a deed executed by an infant *feme sole*. The deed, though not binding, is not void, but voidable:

Note to *Craig v. Van Bebber*, 18 Am. St. Rep. 584-586. In Maine a married woman under twenty-one years of age is not liable upon her executory contracts: *Cummings v. Everett*, 82 Me. 260.

INFANTS, DEEDS OF CONVEYANCE BY, EFFECT OF. — An infant's deed of conveyance, whether it be a feoffment, a deed operating under the statute of uses, or a statutory grant, is not void, but only voidable: Note to *Craig v. Van Bebber*, 18 Am. St. Rep. 582-584.

TITUS v. BRADFORD, BORDELL, AND KINZUA RAILROAD COMPANY.

[136 PENNSYLVANIA STATE, 613.]

TEST OF NEGLIGENCE IN MASTER IN FURNISHING APPLIANCES FOR SERVANT. — From the fact that a particular method or appliance employed by a master is dangerous, it does not follow that it is negligence for him to use it. Some employments are essentially hazardous, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business.

DUTY OF MASTER IN FURNISHING APPLIANCES FOR SERVANT. — A master is not bound to use the newest and best appliances for his servant, but he performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, "reasonably safe" means safe according to the usages, habits, and ordinary risks of the business.

SERVANT CONTINUING IN EMPLOYMENT WITH KNOWLEDGE OF ITS RISKS CANNOT RECOVER. — Where a servant accepts an employment with full knowledge of its risks, and continues therein after having had his attention specially called to the alleged source of the accident by which he is afterwards injured, no recovery can be had against the master for such injury.

TRESPASS to recover damages for the death of the plaintiff's minor son. The defendant's third point, referred to in the opinion, is as follows: "3. The evidence showing that James Titus, the boy killed, had an opportunity of knowing, and did know,—having been employed on the hoist and as brakeman for several months,—the risks incurred in the use of these cars, and by continuing his employment thereunder, accepted such risks, there can be no recovery in this case, and your verdict should be for the defendant." The other facts appear from the opinion.

M. F. Elliott, D. H. Jack, and D. L. Roberts, for the appellant.

Eugene Mullin, for the appellee.

MITCHELL, J. We have examined all the testimony carefully, and fail to find any evidence of defendant's negligence. The negligence declared upon is the placing of a broad-gauge car upon a narrow-gauge truck, and the use of "an unsafe and not the best appliance, to wit, the flat center-plate"; or, as expressed by the learned judge in his charge, in using on the narrow-gauge road the standard car-bodies, and particularly the New York, Pennsylvania, and Ohio car-body described by the witnesses. But the whole evidence of plaintiff's witnesses as well as of defendant's shows that the shifting of broad-gauge or standard car-bodies onto narrow-gauge trucks for transportation is a regular part of the business of narrow-gauge railroads, and the plaintiff's evidence makes no attempt to show that the way in which it was done here was either dangerous or unusual. Haleman says the majority of the bearings fit, and those that do not have hard-wood blocks put under them, and the blocks are fastened with telegraph wire, and he was not positive but that some were bolted on. The particular car complained of was blocked and wired. Cazely and Richmond say it was the custom to haul these broad-gauge cars on the narrow-gauge trucks, though most of the broad-gauge were Erie cars, of a somewhat different construction; and Morris says the car in question was put on a Hays truck, fitted for carrying standard-gauge cars on a narrow-gauge road, and that this particular kind of "Nypano" car was so hauled quite often. These are plaintiff's own witnesses, and none of them say the practice was dangerous. The nearest approach to such testimony is by Morris, who says he "had his doubts."

But even if the practice had been shown to be dangerous, that would not show it to be negligent. Some employments are essentially hazardous, as said by our brother Green in *North C. R'y Co. v. Husson*, 101 Pa. St. 1, 47 Am. Rep. 690, of coupling railway cars; and it by no means follows that an employer is liable "because a particular accident might have been prevented by some special device or precaution not in common use." All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement, or nature of the mode of performance of any work, "reasonably safe" means safe according to the usages, habits, and ordinary risks of the busi-

ness. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community.

In *Iron Ship Building Works v. Natell*, 119 Pa. St. 149, our brother Williams said: "The testimony shows that such an attachment is not in general use. . . . It is not enough that some persons regard it as a valuable safeguard. The test is general use. Tried by this test, the saw of the defendant was such a one as the company had a right to use, because it is such as is commonly used by mill-owners, and it was error to leave to the jury any question of negligence based on the failure to provide a spreader." See also *Payne v. Reese*, 100 Pa. St. 306; *Sykes v. Packer*, 99 Pa. St. 465; *Allison Mfg. Co. v. McCormick*, 118 Pa. St. 519; 4 Am. St. Rep. 613; and *Lehigh etc. Coal Co. v. Hayes*, 128 Pa. St. 294; 15 Am. St. Rep. 680.

As already seen, the testimony of plaintiff's own witnesses showed the custom of the appellant company to perform this part of its work in the way complained of. The defendant's witnesses showed the custom of at least two other narrow-gauge roads to use the same way. There was no countervailing evidence on part of plaintiff, though, as was said in the closely analogous case of *North C. R'y Co. v. Husson*, 101 Pa. St. 1, 47 Am. Rep. 690, "it was certainly a part of the duty of the plaintiff to affirmatively establish that the loading of cars in the manner complained of was an unusual occurrence." In the absence of such evidence, the defendant's last point should have been affirmed, and a verdict directed for the defendant.

It is also entirely clear that defendant's third point should have been affirmed. The deceased had been a brakeman on

this train for five or six months, during which this mode of carrying broad-gauge cars had been used; cars similar to the one on which the accident occurred had been frequently carried, and that very car at least once, about ten days before. He not only thus had ample opportunity to know the risks of such trains, but he had his attention specially called to the alleged source of the accident, by having worked, just before becoming a brakeman, on the hoist by which the car-bodies were transferred to the trucks. It was a perfectly plain case of acceptance of an employment with full knowledge of the risks.

Judgment reversed.

MASTER AND SERVANT — DUTY OF MASTER AS TO MACHINERY. — A master is not bound to furnish his servants with the safest machinery, and provide the best methods of operation. He need only furnish such machinery as is customarily used by persons engaged in the same kinds of employment: *Lehigh etc. Co. v. Hayes*, 128 Pa. St. 294; 15 Am. St. Rep. 680, and note 682, 683.

MASTER AND SERVANT. — A servant having full knowledge of the existence of defects in machinery, and continuing in the work until the happening of an accident chargeable to such defects, and by which he is injured, cannot recover of his employer therefor: *Odell v. New York etc. R. R. Co.*, 120 N. Y. 323; 17 Am. St. Rep. 650, and note. But see *Soeder v. St. Louis etc. R. R. Co.*, 100 Mo. 673; 18 Am. St. Rep. 724.



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2. **WORD "AGENT" OR "TRUSTEE," AFFIXED TO NAME OF PARTY TO CONTRACT, PRIMA FACIE DESCRIPTIVE ONLY.** — Where a person signs a contract, affixing to his name the word "agent," "trustee," or the like, he is *prima facie* individually liable. In order to show that he contracted in a representative capacity, he must prove the existence of that capacity. *Peterson v. Homan*, 564.
3. **AGENT CANNOT ENTITLE HIMSELF TO COMPENSATION FROM BOTH VENDOR AND VENDEE.** — The rule that an agent for the sale of property cannot at the same time act as agent for the purchase thereof, or so interest himself therein as to entitle himself to compensation from both vendor and vendee, is a distinctly recognized rule of public policy, not intended to be remedial of actual wrong, but preventive of the possibility of it, and should be rigidly enforced, unless it appears that the persons for whose protection it is intended expressly agreed, with a knowledge of all the circumstances, to waive their rights under it. And if an agent of the owner of stock receives from a purchaser thereof compensation for his services in making the sale, the fact that he so received it with the knowledge and without the objection of the vendor will not constitute a waiver of the rule and preserve the agent's right to be compensated by the vendor. *Rice v. Davis*, 931.
4. **ESTOPPEL AS AGAINST PRINCIPAL.** — Where an authorized agent brings bail trover in his own name to recover a horse belonging to his principal, and with the assistance of the latter, who does not assert his title at the time, recovers judgment, after which the surety in the bail bond pays the condemnation money into court, the principal is not estopped by his acts to claim the fund as against the agent's creditors, who gave him credit before the trover suit was commenced, and not on the faith of property involved therein, and who were not parties to that suit nor prejudiced by the acts and admissions of the principal. *Watertown Steam Engine Co. v. Palmer*, 368.

5. DECLARATION OF AGENT AS EVIDENCE AGAINST PRINCIPAL. — In an action to recover damages from a railroad company, for an injury sustained by falling into a hole in the company's depot platform, a statement made by its depot agent at the time of the accident, that the "hole ought to have been fixed," is inadmissible to show unreasonable delay on the part of the company in repairing the platform, after the defect became known. *Railway v. Barger*, 155.

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2. MEDICINES, LIABILITY FOR SALE OF DANGEROUS. — One who manufactures a patent or proprietary medicine, concealing its contents from the public, and selling it to druggists, to be by them offered for sale to the public, in bottles containing directions for its use, specifying the quantity in which it should be taken, is answerable to one who purchases it of the druggist and is injured by taking it in the quantities specified in the accompanying directions, if it appears that the medicine contained a drug of which the taker was not aware, and which, in his condition, if the directions given were followed, would probably produce the injurious consequences by him suffered. *Id.*

APPEAL AND ERROR.

1. PRACTICE UPON REVERSAL OF JUDGMENT. — As a general rule, the appellate court, in an action at law, when the case is tried by a jury, upon issues of fact, can only remand the case for a new trial. It has no au-

- thority to direct the trial court to correct the error upon an issue of fact, and to enter judgment accordingly. *Stewart v. Everts*, 17.
2. **APPEAL FROM JUDGMENT WILL BE DISMISSED**, when such appeal is not taken until nearly two years from the time when the judgment was rendered. *Hammond v. Wallace*, 239.
 3. **APPELLATE COURT WILL NOT DISTURB FINDINGS** of the trial court, where there is evidence sufficient to justify them. *Devlin v. Quigg*, 592.
 4. **EVIDENCE NOT PREJUDICIAL**. — In an action against a railway corporation to recover for personal injuries suffered by the plaintiff, the reception in evidence of a city ordinance forbidding the blowing of an engine whistle within the city limits except as a necessary signal cannot entitle it to a reversal. The ordinance clearly contemplated that the whistle might be sounded whenever necessary, and its admission in evidence could not have prejudiced the defendant. *Heddles v. Chicago etc. R'y Co.*, 106.
 5. **ERROR IN GRANTING NONSUIT** is error of law, and if excepted to and specified as such, may be reviewed on appeal, without any specifications of particulars wherein the evidence was insufficient. *Hammond v. Wallace*, 239.
 6. **REFERENCE TO PRIOR VERDICT**. — Where a verdict for damages sustained by personal injuries to the plaintiff had been set aside on appeal as excessive, and the case had again been tried, the fact that counsel for plaintiff referred to the former verdict in an argument to the court in the presence of the jury, and claimed that, in view of additional evidence produced at the second trial, it ought not now to be regarded as excessive, does not entitle the defendant to a reversal, though he objected to the reference when made, and the trial judge declined to interfere, the verdict in the second trial being for a much less sum than that in the first. *Heddles v. Chicago etc. R'y Co.*, 106.
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ASSOCIATIONS.

1. **VOLUNTARY POLITICAL ASSOCIATION NOT COMPELLABLE BY ACTION TO ADMIT PARTY TO MEMBERSHIP.** — Membership in a voluntary political association of individuals, organized without a charter, but regulated as to their action by a constitution and by-laws, is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. And an action cannot be maintained against such an association by a party to compel it to admit him to membership and office therein. *McKane v. Adams*, 785.
2. **UNINCORPORATED JOINT-STOCK COMPANY FORMED FOR BUYING AND SELLING LANDS, RIGHTS OF STOCKHOLDERS IN, AND NATURE OF THEIR INTERESTS.** — Where an unincorporated joint-stock company is formed for buying and selling mineral lands, and its articles of association provide that the property of the association shall be vested in trustees, chosen from among the stockholders, who shall have power to purchase, sell, and convey both real and personal property; that the interest of each member of the association in its property shall be represented and measured by his shares of stock, which shall be transferable by assignment, recorded in the books of the company, and a surrender of the original certificate of stock, — 1. Such association is an artificial juridical person capable of acquiring, holding, and selling property; 2. Its stockholders have no title to its lands, but merely a resulting interest in the business and assets, which can be legally ascertained only by an account; 3. Such company is not dissolved by the death of a stockholder, nor is the nature of his interest as a stockholder changed by his death, and a dividend declared on the stock after his death is governed by the same rules as one declared in his lifetime; 4. If a testator owning such stock bequeaths the income of his estate to one person for life, with remainder to another, a dividend declared after his death out of the proceeds of a sale of land, the company's capital remaining unimpaired, is income within the meaning of the will, and must go to the life tenant, if earned after the testator's death; 5. Such dividend must be regarded as earned after the testator's death, when the profit on the sale of the land is due to a discovery of mineral deposits after his death, although the discovery was not made by the company itself. *Oliver's Estate*, 894.
3. **SOCIAL CLUB. — POWER TO EXPEL MEMBERS.** — A social club incorporated for social purposes, and owning property, and authorized by its charter to expel members for cause, may exercise the power of expulsion for a minor offense, so long as it acts in good faith, and exercises only the powers conferred by the charter. *Commonwealth v. Union League*, 870.
4. **POWER TO EXPEL MEMBERS — LEGALITY OF BY-LAW.** — An incorporated social club may regulate, through its by-laws, the causes for the expulsion of members and the manner of effecting the same, when such power is expressly conferred by its charter, and a by-law providing for the suspension of members guilty of conduct deemed by the board of directors disorderly, or injurious to or hostile to the objects of the club, and conferring on a suspended member the right of appeal, is valid. *Id.*
5. **BY-LAWS, ASSENT TO.** — One who has become a member of an incorporated social club will be deemed to have known and assented to the provisions of its charter and by-laws, which it was authorized to make, in reference to power of expulsion of members, and cannot object to the enforcement thereof on the ground that he is deprived of any legal or constitutional right. *Id.*

6. **LEGALITY OF BY-LAW.** — Where a social club is authorized by its charter to pass by-laws regulating the expulsion of members, such by-laws are legal, although they fail to designate and define specifically what acts are disorderly within the rule subjecting members to expulsion, and leave that question to be determined by the club's board of directors. *Id.*
7. **POWER OF EXPULSION UNDER BY-LAW.** — Where an authorized by-law of an incorporated social club provides that a majority of the directors may expel members for conduct which may by them be deemed disorderly, or injurious to or hostile to the interests of the club, a verdict of expulsion of a member will be sustained by a finding that, in violation of such by-law, he was guilty of rude and ungentlemanly conduct in the club-house, by charging a fellow-member, without provocation, with acting like a blackguard. It is not necessary to the validity of the conviction that the finding should be *in totidem verbis*, in accordance with the by-law. *Id.*
8. **JUDGMENT OF EXPULSION BY, IS RES JUDICATA.** — A judgment of expulsion of a member of a social club, after conviction under its charter and by-laws, in good faith and in a proper and legal manner, renders the case *res judicata*, and precludes its re-examination by a court of justice. *Id.*

See RELIGIOUS SOCIETIES.

ASSUMPTION OF RISKS.

See MASTER AND SERVANT.

ATTACHMENT AND GARNISHMENT.

1. **SUFFICIENCY OF RETURN.** — Where the service of an attachment in case of real property is required to be made by leaving a copy of the writ with the occupant thereof, or if there is no occupant, by leaving a copy in a conspicuous place thereon, a sheriff's return upon the writ which fails to show that the defendant, to whom a certified copy was delivered, was an occupant of the land sought to be attached, or that there was no occupant of such land, or that a certified copy of the writ posted on the front of defendant's dwelling-house was posted in a conspicuous place on such premises, is insufficient. *Hall v. Stevenson*, 803.
2. **REMOVAL OF CAUSE — AMENDMENT OF RETURN.** — The state court has no authority to permit a sheriff to amend an insufficient return made by him on a writ of attachment after the cause has been regularly removed from the state court into the circuit court of the United States. Upon such removal of the cause, the jurisdiction of the state court over it ceases. *Id.*
3. **SEVERAL SEPARATE AND DISTINCT PARCELS OF LAND CANNOT BE ATTACHED** by posting a copy of the writ of attachment on one of them only. *Id.*
4. **EXEMPTIONS.** — **DEBTOR WHOSE PROPERTY HAS BEEN SEIZED UNDER ATTACHMENT,** and advertised to be sold, is not thereby deprived of his right to claim the property as exempt at any time before sale, as provided by sections 521 and 552, Nebraska Civil Code. *State v. Carson*, 681.
5. **EXEMPTIONS — TRANSFER OF PROPERTY NOT WAIVER.** — A debtor whose property has been seized under attachment, and advertised to be sold, may, at any time before the sale, claim it as exempt from execution. The fact that he has transferred it to his wife, and testified, in an action by her to regain it, that it was hers absolutely, will not deprive him of the right of afterwards claiming it as exempt. *Id.*

6. **EXEMPTIONS — WAGES.** — A clerk or other employee wrongfully discharged before the expiration of his term may, upon its expiration, bring suit to recover the wages due for the entire term, and the money thus recovered will be exempt from garnishment as though earned by actual service. *Cox v. Bearden*, 359.
7. **EXEMPTIONS — WAGES IN HANDS OF SHERIFF NOT LIABLE TO SEIZURE.** — Money recovered as wages and exempt from garnishment while in hands of the employer, is also exempt from seizure by other process, while in the hands of the sheriff. *Id.*
8. **ATTACHMENT OR EXECUTION, PROPERTY NOT SUBJECT TO.** — THE GIVING OF A DELIVERY BOND, after the levy of a writ of attachment wherein the sureties undertake, in the event of the plaintiff's recovering judgment, to deliver the property to the officer who levied the writ, or on failure to do so, to pay the value thereof, not exceeding the amount of the judgment, does not release the lien of the attachment, nor render the property subject to seizure under other writs while in the hands of the defendant in attachment. *Stevenson v. Palmer*, 295.
9. **ATTACHMENT AND EXECUTION.** — SURETIES ON A DELIVERY BOND under which attached property has been, by the officer levying the writ, surrendered to the defendant, have no right to the possession thereof before the entry of final judgment in the action, and hence cannot maintain an action of replevin against an officer who subsequently seizes the property under another writ. *Id.*
10. **ATTACHMENT AND EXECUTION.** — If, after attached property is surrendered to the defendant in pursuance of a delivery bond, it is seized and taken from his possession under another writ, whereupon he executes, with sureties, another delivery bond, and again gains possession of the property, and upon judgment being recovered against him in the second action, surrenders possession of the property to an officer, pursuant to the terms of the second bond, he cannot maintain an action against the second officer for the possession of the property, though the second levy, by reason of the first, was unauthorized. *Id.*

See CORPORATIONS, 11; JURISDICTION, 2, 3.

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BAILMENT

1. **BAILEE'S RIGHT TO RECOVER DAMAGES.** — The hirer of a vehicle is entitled to recover for injuries thereto resulting from the negligence of another in whose custody the hirer placed it, because the latter is answerable to the general owner. *Amer. Dist. Tel. Co. v. Walker*, 479.
2. **LIABILITY FOR DELIVERY TO STRANGER.** — A gratuitous bailee who delivers the subject of the bailment to an apparent stranger, without effort to verify the latter's claim to the property, and without inquiry as to its ownership, is liable to the real owner for the value of the goods. *Wear v. Gleason*, 186.

- 3. DUTY OF BAILEE FOR HIRE WHERE PROPERTY IS DEMANDED BY THIRD PERSON UNDER COLOR OF PROCESS.** — When property in the custody of a bailee for hire is demanded by a third person under color of process, it is his duty to ascertain whether the process is such as requires him to surrender the property, and if it is not, it is his right and duty to refuse to surrender it, and to offer such resistance to the taking, and adopt such measures for reclaiming it if taken, as a prudent and intelligent man would if it had been demanded and taken under a claim of right to the property by another without legal process. *Roberts v. Stuyvesant S. D. Co.*, 718.
- 4. BAILEE CANNOT DEFEND BY SHOWING BAILOR'S PROPERTY WAS TAKEN FROM HIM UNDER LEGAL PROCESS WHEN.** — While a bailee who permits the property of the bailor to be taken by a stranger may excuse himself by showing that he yielded to the power of legal process, a seizure under such process, after the bailee has negligently allowed the property to pass into the hands of trespassers, or persons who have no right to it, will be no protection to him in an action by the owner. The mere levy of an execution or attachment upon property by a creditor of the owner, while it is in the possession of the tort-feasor is not, therefore, available as a defense or in mitigation in an action by the owner against the bailee for the conversion or negligent loss of the property bailed. *Id.*
- 5. BAILEE CANNOT JUSTIFY OR DEFEND UNDER REVERSED JUDGMENT WHEN.** — Where a bailee wrongfully and negligently permits his bailor's property to be appropriated by the latter's creditors under attachments and executions in cases in which the judgments were released and discontinued, he cannot, in an action against him by the bailor, justify or defend under such judgments. The attachments and executions fall with the judgments, and the judgment creditors would be compelled to make restitution, and the bailee cannot stand in any better position. *Id.*
- See CARRIERS; HUSBAND AND WIFE, 8; TRIAL, 5; WAREHOUSEMEN.

BANKS AND BANKING.

SET-OFF, BANK'S RIGHT OF. — If debt owing to a bank by an insolvent is not due it cannot be set off against a debt due from the bank to him, and his assignee in insolvency may consequently sustain an action against the bank therefor. *Oatman v. Batavian Bank*, 136.

See TRUSTS, 6.

BAWDY-HOUSES.

See CRIMINAL LAW, 20-24.

BAY-WINDOWS.

See INJUNCTIONS, 2; MUNICIPAL CORPORATIONS, 3.

BEEES.

See MUNICIPAL CORPORATIONS, 23.

BENEFICIARIES.

See INSURANCE, 32-38.

BIBLE-READING.

See SCHOOLS.

BIGAMY.

See CRIMINAL LAW, 7-9.

BILLS OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS, 6, 7.

BILLS OF LADING.

See CARRIERS, 3-6.

BILLS OF SALE.

See CHATTEL MORTGAGES, 3.

BONA FIDE PURCHASER.

See DEEDS, 2; EXECUTIONS, 5; FRAUDULENT CONVEYANCES, 7; USURY 1.

BOND FOR TITLE.

See VENDOR AND VENDEE, 16.

BONDS.

See HOLIDAYS, 1.

BROKERS.

See AGENCY.

BURDEN OF PROOF.

See AGENCY, 2; CARRIERS, 2, 3, 17; EXECUTIONS, 5; FRAUDULENT CONVEYANCES, 7; MASTER AND SERVANT, 7, 11, 22; NEGLIGENCE, 10, 11; RAILROAD COMPANIES, 11; USURY, 2.

BURGLARY.

See CRIMINAL LAW, 10-18; SCHOOLS, 8, 9.

BY-LAWS.

See ASSOCIATIONS.

CANCELLATION OF LEASE.

See LANDLORD AND TENANT, 5.

CARRIERS.

1. **CONTRACT EXEMPTING FROM LIABILITY FOR NEGLIGENCE.** — A common carrier may, by special contract, limit his common-law liability as insurer of goods intrusted to him for transportation against loss or damage. He cannot so free himself from liability for loss or damage occasioned by his negligence, or that of his servants. *Witting v. St. Louis etc. R'y Co.*, 636.
2. **NEGLIGENCE — BURDEN OF PROOF.** — Where a cause of action against a common carrier is for his negligence, and not on his common-law liability as an insurer, the burden of proof is upon the plaintiff from the beginning to the end of the case. *Id.*

3. **NEGLIGENCE — BURDEN OF PROOF.** — Where the bill of lading exempts the carrier from liability for breakage, he must, in an action for damage, in the first instance, bring himself within the exemption; the burden of proof is then upon plaintiff to prove the carrier's negligence. *Id.*
4. **BILL OF LADING ISSUED BY CARRIER FOR GOODS NOT RECEIVED DOES NOT ESTOP.** — A bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and the carrier is not estopped by the statements in such bill from showing that no goods were in fact received for transportation. *National Bank v. Chicago etc. R. R. Co.*, 566.
5. **MINNESOTA STATUTE MAKING BILLS OF LADING NEGOTIABLE** does not put them on the footing of bills of exchange, but merely makes the transfer and delivery of these symbols of property, in the mode therein prescribed, equivalent, for certain purposes, to an actual transfer and delivery of the property itself. *Id.*
6. **DEFENSE THAT GOODS WERE TAKEN FROM CARRIER BY TRUE OWNER.** — In an action against a carrier for the non-delivery of goods, it is a good defense, even against an innocent indorsee of the bill of lading, that the property was taken from his possession by one having a paramount title. *Id.*
7. **ROUND-TRIP RAILWAY TICKET, UNUSED PART OF, TRANSFERABLE.** — A round-trip railway ticket used by the buyer thereof in traveling to the place named therein, and then sold and transferred to another person, in the absence of any restrictions in the original contract of sale, is valid in the hands of the holder, and entitles him to a return passage. *Carsten v. Northern P. R. R. Co.*, 589.
8. **DAMAGES FOR UNLAWFUL ATTEMPT TO EJECT PASSENGER FROM RAILWAY TRAIN.** — If the conductor of a railway train refuses to recognize a valid ticket, and demands from the holder the regular fare, and attempts to eject him by force for non-payment, the company will be liable in damages for the assault, and in assessing the damages the jury may consider, in connection with the assault, the annoyance, vexation, and indignity suffered by the passenger. *Id.*
9. **DAMAGES TOO REMOTE WHEN.** — In an action to recover damages for unlawfully ejecting a passenger from a railway train, damages resulting from his loss of a job of work, by reason of his delay at the station at which he was compelled to leave the train, are too remote to be considered. *Id.*
10. **NEGLIGENCE, CONTRIBUTORY.** — A passenger is not guilty of contributory negligence, as a matter of law, if the train on which he was riding approaches a station, whose name is called out, and it stops for a moment, and then starts on, and he, believing the station to have been reached, and the train to be starting to leave it, steps from the cars, and is struck by a train moving in the opposite direction, though if he had looked ahead he would have seen the light of the advancing train, if he got off at a place where passengers are permitted to alight, and when he knew of a rule of the corporation that an approaching train must be stopped, and not permitted to pass a train discharging passengers. *Philadelphia etc. R. R. Co. v. Anderson*, 483.
11. **NEGLIGENCE, CONTRIBUTORY.** — A PASSENGER ON A RAILWAY TRAIN has the right to assume that its rules will be enforced, and cannot be adjudged

guilty of contributory negligence because he relied upon their observance, and omitted a precaution which, but for the existence of the rule, it would have been his duty to take. *Id.*

12. **CAR — PASSENGER ALIGHTING FROM MOVING TRAIN.** — A passenger who is injured in alighting from a moving train after it has passed the station of his destination, and who attempts to alight without invitation or an announcement of the station, has the burden of proof to show negligence on the part of the railroad company; and although the accident happened from a failure of the air-brakes to respond in stopping the train, he cannot recover, if it is shown that such brakes worked perfectly at other stopping-places on the same trip, and were not out of order through any negligence of the company, and that it used proper efforts by means of hand-brakes to stop the train. Nor is the fact that when the train had stopped after the accident it was suddenly started up any evidence of negligence on the part of the company, in the absence of evidence that the sudden starting of the train had anything to do with the accident. *Porter v. Chicago etc. R'y Co.*, 511.
13. **NEGLIGENCE — EVIDENCE.** — In an action by a passenger against a railroad company to recover for personal injuries caused by a broken rail, evidence of the defective condition of the track in places not in the vicinity of that accident, and so far distant therefrom that they could not by any possibility have in any way contributed to the accident which caused the injury sued for, is not admissible. *Stewart v. Everts*, 17.
14. **NEGLIGENCE — EVIDENCE.** — In an action by a passenger against a railroad company to recover for personal injuries caused by reason of a broken rail, plaintiff should not be permitted to exhibit to the jury pieces of a broken rail, claimed to have been picked up at the place of accident, six months thereafter, and after exposure for that length of time to the action of the elements; nor should his counsel be permitted to comment to the jury upon the character and condition of such pieces of rail, nor should the jury be allowed to draw a conclusion from an inspection of such pieces of rail, as to the soundness or unsoundness thereof. *Id.*
15. **NEGLIGENCE — EVIDENCE.** — In an action by a passenger against a railroad company to recover for personal injuries caused by reason of a broken rail, evidence as to the condition of the railroad ties at the place of the accident, as to their soundness and the condition of the road-bed there at the time that the ties were removed and the road repaired, six months after the accident happened, is competent, as tending, to some extent, to show the condition at the time of the accident. *Id.*
16. **CONTRIBUTORY NEGLIGENCE.** — A postal clerk who while off duty and returning to his home is entitled to ride in defendant's passenger-cars, but who while on duty was required, and when off duty was permitted, to ride in a postal-car, and who while there riding is killed by a collision, is not to be held guilty of contributory negligence as a matter of law, precluding any recovery for his death, though he was not on duty at the time, and had he remained in the passenger-car his position would have been less dangerous, and he would probably not have suffered any injury. *Baltimore etc. R. R. Co. v. State*, 454.
17. **BURDEN OF PROOF.** — OCCURRENCE OF ACCIDENT TO A PASSENGER IS PRIMA FACIE EVIDENCE of negligence on the part of the carrier, throwing upon it the *onus* of rebutting the presumption by proof that there was no negligence. This can only be done by proving facts and circumstances explaining the cause of the accident, showing it to have been such as

could not have been guarded against by the utmost care and prudence. *Philadelphia etc. R. R. Co. v. Anderson*, 483.

18. IMPLIED CONTRACT TO CARRY LUGGAGE of a passenger includes only such a quantity of articles as are ordinarily taken by a passenger for his personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey. *Metz v. California S. R. R. Co.*, 228.
19. JEWELRY AS BAGGAGE. — A gentleman passenger traveling without his wife or other female companion is not, ordinarily, no matter what his station in life, entitled to carry as baggage, for his personal use or convenience, a quantity of lady's jewelry; and if he does carry it, and it is lost, he cannot recover therefor from a carrier who has no knowledge of its being among the contents of a trunk carried as luggage. *Id.*

See CORPORATIONS, 2

CAUSE OF ACTION.

See ASSIGNMENT, 1, 2

CERTIORARI.

See EXECUTORS AND ADMINISTRATORS, 4.

CHATTEL MORTGAGES.

1. REGISTRATION — CHATTEL MORTGAGE, WHAT IS A FILING OF. — If a mortgagor, at the request of his mortgagee, takes a chattel mortgage to the proper town clerk's office and hands it to him, and he takes it into his possession and files it, it is duly filed, and operates as constructive notice to subsequent purchasers, though before their purchase it is abstracted through the negligence or misconduct of the town clerk, but without the fault of the mortgagee. *Marlet v. Hinman*, 102.
2. FRAUDULENT ALTERATION BY MORTGAGEE'S AGENT. — The fraudulent and material alteration of a chattel mortgage by the agent of the mortgagee, before possession is delivered to the latter, by inserting in the mortgage a description of property not conveyed or intended to be conveyed, avoids the mortgage, and prevents foreclosure in the hands of the mortgagee, when the agent was not restricted by the terms of his agency as to the security he might take. In such case it is immaterial that the fraudulent alteration was not authorized by or known to the mortgagee, if not expressly forbidden, and it was in the line of the agent's agency, and because of it. *Hollingsworth v. Holbrook*, 411.
3. BILL OF SALE AS SECURITY — CONSIDERATION — RIGHTS OF CREDITORS. — Where a bill of sale in the nature of a chattel mortgage is given for a named consideration, and nothing appears upon its face to indicate that it was intended to secure any other or greater sum, the creditors of the mortgagor are required to treat the instrument as valid only to the amount specified. *Mueller v. Provo*, 525.

CHECKS.

See PAYMENT, 1, 2

CHINESE LABORERS.

See MUNICIPAL CORPORATIONS, 1.

CHURCHES.

See RELIGIOUS SOCIETIES.

COHABITATION.

See MARRIAGE AND DIVORCE.

COLOR OF PROCESS.

See BAILMENT, 3-5.

COMMON CARRIERS.

See CARRIERS.

COMMON LAW.

See JURISDICTION, 1.

COMPENSATION.

See HUSBAND AND WIFE, 4, 5.

COMPLAINT.

See PLEADING.

CONDITIONS IN POLICY.

See INSURANCE.

CONFLICT OF JURISDICTION.

See JURISDICTION, 2, 3.

CONFLICT OF LAWS.

See ACTIONS; EXECUTORS AND ADMINISTRATORS, 1; NEGOTIABLE INSTRUMENTS, 1; WILLS, 4.

CONFUSION OF GOODS.

See AGENCY, 6; TRUSTS, 7-9, 10.

CONSIDERATION.

See CHATTEL MORTGAGES, 3; FRAUDULENT CONVEYANCES, 4, 9; VENDOR AND VENDEE, 5.

CONSPIRACY.

INQUISITION OF LUNACY. — A complaint claiming damages, and alleging that defendants maliciously conspired together and willfully, maliciously, and falsely sued out an inquisition of lunacy against plaintiff, with intent to destroy her character, deprive her of her means of support, and force her to leave the community, and also to destroy her testimony in a criminal prosecution against one of the defendants, whereby plaintiff has been brought into public scandal and disgrace, and greatly injured in her reputation and business as a dressmaker, states a good cause of action. *Smith v. Nippert*, 26.

See CRIMINAL LAW, 15.

CONSTITUTIONAL LAW.

See EMINENT DOMAIN; EXECUTIONS, 7; SCHOOLS; STATUTES.

CONTEMPT.

1. NEWSPAPER PUBLICATION charging a judge with "deliberate lying about the law, deliberate intentional falsification in his official capacity, and deliberate intentional denial of justice" in a case before him, in which a demurrer to the complaint has been sustained with leave to amend, and before the time for amendment has expired and the case finally disposed of, is a flagrant abuse of the liberty of the press, an "unlawful interference with the proceedings of a court," and a contempt of court, within the meaning of subdivision 9 of section 1209, California Code of Civil Procedure. *Ex parte Barry*, 248.
2. LIBERTY OF THE PRESS to fairly criticise the official conduct of a judge, or the decisions or proceedings of courts, and to expose any wrongful, corrupt, or improper act of a judicial officer, will be carefully preserved and protected by the courts; but if a newspaper publisher prints and circulates unjust censures, or false charges concerning such matters, he will be held strictly accountable, and punished for contempt. *Id.*

See EXECUTORS AND ADMINISTRATORS, 5.

CONTRACT OF SALE.

See EVIDENCE, 5, 6; VENDOR AND VENDEE.

CONTRACTS.

MUNICIPAL CORPORATION. — ONE WHO CONTRACTS WITH A CITY TO FURNISH WATER to be used in extinguishing fires is not liable to an action by a tax-payer who claims to have suffered the loss of his property by the failure of the defendant to furnish water according to his agreement, because there is no privity of contract between such contractor and tax-payer. *Fowler v. Athens City Water-works Co.*, 313.

See HUSBAND AND WIFE, 4, 5; INJUNCTIONS, 1; PHOTOGRAPHER; SET-OFF, 3.

CONTRACTS OF INSURANCE

See INSURANCE.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS, 10-12, 16; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 12; NEGLIGENCE, 3, 7-9, 14, 15.

CORPORATIONS.

1. LIABILITY, LIMITATION OF. — Where a corporation engaged in the business of furnishing messenger-boys to perform various services was in the habit of limiting the extent of the damages to which it might become answerable in the course of its services, and the condition prescribing such limitation was printed at the foot of its blank delivery tags, it was held that evidence of the limitation was rightfully excluded, where there was no evidence of any contract, by tags or otherwise, containing any limitation of liability. *American Dist. Tel. Co. v. Walker*, 479.
2. AN AGREEMENT TO CARRY OR DELIVER PROPERTY FOR A REWARD, made by one who is not a common carrier, creates the duty to exercise reason-

able care, but does not impose a liability on him for losses not occasioned by the ordinary negligence of himself or his servants. *Id.*

3. **MESSENGER-BOY, NEGLIGENCE OF.** — If a corporation, engaged in supplying messenger-boys to perform various services, on being asked for a boy competent to drive a pair of horses to a stable, sends a boy to take charge of them, who undertakes to drive them to the stable, but through his negligence or want of skill they run away, causing damage to themselves and the vehicle to which they were attached, the corporation is answerable for the damages thus occasioned. *Id.*
4. **RIGHT TO SURRENDER STOCK.** — A corporation may contract to surrender its stock, when its articles of incorporation do not prohibit such contract, while the powers they enumerate are broad enough to include the right to make it. *Rollins v. Shaver etc. Co.*, 427.
5. **PURCHASER OF STOCK OF A CORPORATION, UPON WHICH, BEFORE ITS DELIVERY, A DIVIDEND IS DECLARED,** has no right to refuse to pay for the stock until the seller gives him an order on the corporation for the payment of such dividend. If by law he is entitled to the dividend, such an order is unnecessary, and he has no right to exact it. By insisting upon the order, and refusing to make payment without it, the purchaser rescinds the contract, and loses his right both to the stock and to the dividend. *Phinizy v. Murray*, 342.
6. **DIVIDEND, TO WHOM BELONGS.** — If, after a contract is made for the sale of shares of stock, but before the time appointed for paying therefor, a dividend is declared, the purchaser is entitled thereto on complying with his contract to purchase. *Id.*
7. **CORPORATION IS LIABLE FOR THE TRANSFER OF STOCKS** which stand on its books in the name of one as trustee, unless he was authorized to make such transfer, because a trustee is not presumed to have the right to sell or transfer, and the corporation is affected with notice that he has probably violated his trust in attempting to transfer the trust property without producing any authority for so doing. *Marbury v. Ehlén*, 467.
8. **NOTICE NOT LOST BY LAPSE OF TIME.** — If stock of a corporation stands on its books in the name of a testator, and his executors transfer it to another person, designated as trustee, the corporation is thereby informed of a will, and given notice of its contents and of the terms of any trust thereby created, and though the stock continues to stand in the name of such trustee for fourteen years, the corporation will be deemed to have continuing knowledge of the will and trust, and will be liable for permitting a transfer by the trustee in contravention of the trust. *Id.*
9. **NOTICE OF WILL AND TRUST.** — Where stocks of a corporation stand on its books in the name of a decedent, and a transfer thereof is made by his executors to another person as trustee, the corporation is thereby notified of the existence of the will, and required, before proceeding further, to inform itself of the terms of the will and of the trust upon which the executors were authorized to transfer the stock to the trustee, and is liable if it permits the latter to transfer the stock under circumstances inconsistent with his trust. *Id.*
10. **CORPORATION MUST SEE THAT NO UNAUTHORIZED TRANSFERS OF ITS STOCK ARE MADE,** and is liable to any one injured by a breach or neglect of this duty. *Id.*
11. **ATTACHMENT OF CORPORATE PROPERTY BY OFFICER OF CORPORATION,** to secure the payment of a debt honestly due by it to him, creates a lien superior to that of a trust deed subsequently executed by it, or of sub.

sequently attaching creditors, although he knew at the time of levying his attachment that the corporation was financially embarrassed and that his attachment would precipitate a crisis in its affairs, for the prior condition of which he was in no way responsible. *Rollins v. Shaver W. & C. Co.*, 427.

12. **TRUST DEED BY INSOLVENT CORPORATION** which is in effect a general assignment to secure certain of its creditors is not void on the ground that it gives preferences, nor is it void as being the result of a fraudulent combination because the decision of its directors as to what creditors should be secured was the result of a compromise, nor is it void because some of the claims secured by it were fraudulent, while others were unquestionably just. *Id.*
13. **WHERE TRUST DEED BY INSOLVENT CORPORATION** to secure certain creditors is shown to have been executed under a resolution passed at a meeting of directors, at which four out of five of them were present, two voting in favor of and one against its adoption, and the minutes of the meeting show that it was adopted, and that they were signed and approved by the president, thus raising the presumption that he voted for the resolution, if that was necessary to its validity, although his vote is not shown by the minutes, the deed is legal and valid, if adopted by the creditors named therein as beneficiaries. *Id.*
14. **TRUST DEED BY INSOLVENT CORPORATION TO SECURE CREDITORS — COMPLAINT OF FRAUD BY SUBSEQUENT CREDITORS.** — Where a trust deed is given by an insolvent corporation to secure certain creditors, and one of the secured creditors holds notes against the corporation, given for value, the other creditors cannot claim a set-off on account of fraud in another transaction between such creditor and the corporation, if such transaction took place before they became creditors. *Id.*
15. **TRUST DEED EXECUTED BY DIRECTORS OF AN INSOLVENT CORPORATION** to secure certain creditors is not void as to one of the creditors secured, on the ground that certain of the directors executing it were relatives of such creditor, when it appears that they acted in good faith and without fraudulent intent. *Id.*

See MUNICIPAL CORPORATIONS, 16-20; TRUSTS, 10.

CORPOREAL HEREDITAMENT.

See WATERCOURSES, 3.

CO-TENANCY.

See DEEDS, 1; PARTITION; PRIVATE WAYS, 3.

COUNTERCLAIM.

See PLEADING; SET-OFF.

COUNTIES.

NEW COUNTIES — JURISDICTION OF OFFICERS OF OLD COUNTY OVER NEW COUNTY. — Where a new county is organized out of the territory of an old county, the jurisdiction and duties of the officers of the latter over the territory included in the former cease; and the treasurer of the old county cannot be compelled by *mandamus* to collect unpaid taxes from the new county which were levied prior to the division. In such case, where one of the counties is not a party to the action, it cannot be decided who is entitled to such taxes. *State v. Clevenger*, 674.

COVERTURE.

See HUSBAND AND WIFE.

CREDITORS' SUITS.

See EXECUTORS AND ADMINISTRATORS, 2-5.

CRIMINAL EVIDENCE.

See CRIMINAL LAW, 13-18, 20-24.

CRIMINAL LAW.

1. INSTRUCTIONS — ASSUMPTION OF GUILT. — Where it appears from the whole charge that the court did not intend to interfere with the right of the jury to believe the testimony of a witness, but simply to inform it that if it believed it, other evidence would be necessary to warrant a conviction, a clause in the charge, that such witness was "an accomplice," cannot be construed as an assumption of defendant's guilt. *Fort v. State*, 163.
2. SUFFICIENCY OF VERDICT. — A verdict that "we, the jury in the case of *State of Iowa v. Harry Lee*, the defendant guilty as charged in the indictment," omitting the word "find," is not fatally defective under a statute providing that the general verdict, on the plea of not guilty, is either "guilty" or "not guilty." *State v. Lee*, 401.
3. JUDGMENT CONSIGNING PERSON TO WORK IN CHAIN-GANG for failure to pay a fine imposed for the violation of a city ordinance is void, unless expressly authorized by statute. *Carr v. Conyers*, 357.
4. SELF-DEFENSE AGAINST VENGEANCE OF HUSBAND. — Adulterer caught in or immediately after an act of adultery by his paramour's husband should seek safety in flight, and if the husband should attack him, he has no right to stand his ground or cut to repel the husband's attack upon him, though it may be a dangerous attack. *Drysdale v. State*, 340.
5. ATTEMPT TO COMMIT CRIME, WHAT CONSTITUTES. — Under a statute making an attempt to commit a crime punishable, and defining such attempt as "an act done with intent to commit a crime, and tending but failing to effect its commission," the question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. Whenever the *animo furandi* exists, followed by acts apparently affording a prospect of success, and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute, although for some cause not previously apparent to him the crime was at the time incapable of accomplishment by him. And therefore, upon the trial of an indictment for an attempt to commit larceny, evidence that the accused was seen, while moving around among a crowd of people, to thrust his hand into the pocket of a woman and to withdraw it therefrom empty, is sufficient to sustain a verdict finding the accused guilty of the offense charged, although, owing to the fact of the woman having become lost in the crowd, there was no evidence that she had at the time any property in her pocket which could be the subject of larceny. *People v. Moran*, 732.
6. PROVISION OF NEW YORK CONSOLIDATION ACT, SECTION 1474, WAS REPEALED by the subsequent adoption of the Penal Code, as being inconsistent therewith. *Id.*

7. **BIGAMY.** — After verdict of guilty of bigamy, it is no ground for arrest of judgment that the indictment charged that defendant's lawful wife was "one — Nelms," whose name was not known to the grand jury. *Nelms v. State*, 377.
8. **BIGAMY.** — Under an indictment charging defendant with bigamy, and that his lawful wife was "one — Nelms," whose name was not known to the grand jury, evidence is admissible to show her true name. *Id.*
9. **BIGAMY IS COMMITTED** by a married man who, having a wife living, marries another woman, though he does not cohabit with her, and is arrested immediately after the performance of the marriage ceremony. *Id.*
10. **BURGLARY — WHAT CONSTITUTES BREAKING.** — An entry into a factory, effected by turning the bolt of a door in the daytime, and not made for the purpose of lawful business, nor within business hours, is an entry by breaking, so as to constitute burglary within the meaning of section 4386, Georgia code. *Kent v. State*, 376.
11. **BURGLARY.** — **INDICTMENT** for burglary, alleging that the house entered "belonged" to a certain party, naming him, sufficiently charges the ownership of the house. *State v. Fox*, 425.
12. **BURGLARY.** — **INDICTMENT** for burglary is not bad for duplicity when it alleges that the entering was done for two purposes; namely, with an intent to steal, and with an intent to commit adultery. *Id.*
13. **BURGLARY — PRESUMPTION.** — One who breaks into the dwelling-house of another in the night-time, in the absence of any explanation of the act, will be presumed to have intended to commit a public offense, but such presumption may be overcome by evidence. *Id.*
14. **BURGLARY — VERDICT SUPPORTED BY PRESUMPTION.** — One who breaks into the dwelling-house of another in the night-time, in the absence of any explanation of the act, will be presumed to have intended to commit a felony, and if he was identified while in the house, a verdict of guilty of burglary will be sustained. *Id.*
15. **BURGLARY — EVIDENCE.** — On the trial of one defendant who is jointly indicted with another for the burglary of a county treasury, evidence that one, in the absence of the other, proposed to obtain money, through the witness, from the county treasury is admissible, when it is shown that the proposition was renewed by both defendants, and that their conduct on these occasions was part of a conspiracy to induce the witness to aid them in committing the burglary. *Fort v. State*, 163.
16. **BURGLARY — EVIDENCE.** — On a trial for burglary, it is not reversible error to allow a witness to state that force had been applied from the outside to break the lock of an inner vault door secured by an ordinary lock and key. Such evidence is rather a conclusion of fact than an expression of opinion. *Id.*
17. **BURGLARY — EVIDENCE.** — On a trial for burglary, it is not error to refuse to allow a witness, who had testified fully as to the appearance of certain locks and doors after the burglary, to state whether he thought the inner vault door was opened first, and the lock broken afterwards, as such statement would involve a speculative opinion, not necessarily based on what he had observed. *Id.*
18. **BURGLARY — CORROBORATING EVIDENCE OF ACCOMPLICE.** — On a trial for burglary, the evidence of the prosecuting witness, who was also an accomplice of the defendants, and who testified to their guilt, is sufficiently corroborated to sustain their conviction, where it is shown that one of the defendants admitted that he had entertained a

proposition from the prosecuting witness to commit the burglary, and agreed to and submitted the matter to the other defendant, who confessed that he joined in the conspiracy, and obtained the combination of a safe from the prosecuting witness for the purpose of committing the burglary; that the crime was committed by some one who knew the combination; that on the night of its perpetration defendants came to the town wherein the safe was situated, without apparent business, and left before daylight, and that they afterwards denied having been in town that night. *Id.*

19. **QUARRELING, CURSING, AND ACTING DISORDERLY—WHAT DOES NOT CONSTITUTE.**—A party charged with quarreling, cursing, and acting otherwise disorderly, in violation of an ordinance, cannot be convicted, when it appears that the only disorderly conduct of which he was guilty was the use of words which, though vituperative and threatening, were not profane, and were spoken in an ordinary tone of voice to one who did not reply thereto. Such words, used by one alone, do not constitute a quarrel, nor are they cursing, when it is questionable if even the word "dam" was used. *Carr v. Conyers*, 357.
20. **REPUTATION OF HOUSE OF ILL-FAME—EVIDENCE OF REPUTATION.**—On the trial under an indictment for keeping a house of ill-fame, the statements and declarations of traveling men who frequently visit the city where the house is situated is competent evidence, as tending to establish the general reputation of the house. *State v. Lee*, 401.
21. **HOUSE OF ILL-FAME—EVIDENCE OF REPUTATION.**—On the prosecution of an indictment for keeping a house of ill-fame, where witnesses have testified that such house did not have the reputation of being a house of ill-fame, they may be asked on cross-examination, for the purpose of showing that their occupation, habits, interests, and relations were not such that they would be apt to know of its reputation, whether they were married, had sons old enough to visit houses of ill-fame, what interest they had in such houses or lewd women, and whether they had talked with others in regard to such houses. *Id.*
22. **HOUSE OF ILL-FAME—CONSTRUCTION OF HOUSE.**—On the prosecution of an indictment for keeping a house of ill-fame, where it is shown that the building consists of two stories, the rooms on the first floor of which were used for saloon, gambling, and other purposes, while the rooms on the second floor were used for drinking and gambling purposes, and one as a sleeping apartment, and the rooms on both floors had direct communication with each other, and were all used together for the purpose of carrying on the same business, and all frequented by men and women of lewd character, the prosecution cannot be compelled to elect as to which story of the house it will charge as being the house of ill-fame. *Id.*
23. **HOUSE OF ILL-FAME—EVIDENCE OF PROFIT.**—On the prosecution of an indictment for keeping a house of ill-fame, proof that the house was kept for the purposes of gain is not necessary, as the statute does not make that an element of the crime. *Id.*
24. **HOUSE OF ILL-FAME.**—Indictment for keeping a house of ill-fame is sustained by proof that it was kept by defendant as a house of ill-fame, and resorted to for purposes of prostitution, without proof of its general bad reputation. *Id.*
25. **FORCIBLE ENTRY AND DETAINER—EVIDENCE.**—An entry by one upon land in the possession of another, with such a show of force as to make

- it useless for the occupant to try to maintain his possession, is a forcible entry; and proof that the person so entering remained in possession is admissible to show that he made his entry complete and effectual, although he is not charged with forcible detainer. *Lisener v. State*, 389.
26. **LARCENY. — GUILTY KNOWLEDGE** or participation is essential to the conviction of one who assists in the commission of a larceny. *State v. Norman*, 623.
27. **LARCENY — INSTRUCTIONS.** — Where, upon the trial of a charge of grand larceny, the evidence will only sustain a conviction of petit larceny, the jury must be charged both as to grand and petit larceny. It is error to charge to convict of grand larceny, or to acquit. *Id.*
28. **RAPE — INSTRUCTIONS.** — On a trial for rape, where the evidence conflicts as to the amount of resistance offered and force used, the prejudice likely to be aroused against the defendant by the heinous nature of the charge, and the difficulty in defending against it, should be pointed out to the jury, and it should be instructed that it is not rape if the woman voluntarily submitted while she had power to resist, no matter how reluctantly she yielded or tardily gave her consent, or how much force had been previously employed. *Reynolds v. State*, 659.
29. **RAPE. — ERROR CANNOT BE PREDICATED** by the accused, in a trial for rape, on evidence first drawn out by his attorney on cross-examination. *Id.*
30. **ROBBERY.** — It is not necessary in a case of robbery to prove that the property was actually taken from the person of the owner, but it is sufficient if it is taken in his presence. *Clements v. State*, 385.
31. **ROBBERY** may be committed by taking the property of a person from his dwelling-house while he is confined in his smoke-house fifteen steps from the dwelling, and where he is prevented, by threats and intimidation, from leaving the smoke-house and returning to the dwelling while the robbery is being perpetrated. *Id.*

See EXTRADITION; MUNICIPAL CORPORATIONS, 1; NEW TRIAL, 2.

CURSING.

See CRIMINAL LAW, 19.

DAMAGES.

1. **MEASURE OF DAMAGES FOR PERSONAL INJURIES.** — In an action to recover compensation for personal injuries which had led to the amputation of the plaintiff's legs, it is not error to instruct the jury that "the proper elements of damages are adequate compensation for all of the physical and mental pain and suffering which the plaintiff suffered at the time of the accident, which he has suffered since that time, and which he is reasonably certain to suffer in the future by reason of his injuries; also for the mortification and anguish which he has suffered, and will in future suffer, by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows." *Heddles v. Chicago etc. Ry Co.*, 106.
2. **DAMAGES FOR NEGLIGENCE — INSTRUCTIONS.** — In an action to recover for injury from being struck by a railroad locomotive, through the negligence of the company, an instruction that plaintiff is entitled to such reasonable sum as damages as his injury occasioned, but not to find for more than the sum claimed in the complaint, is proper, and not erroneous as

directing the jury to find for the full sum claimed. *McMarshall v. Chicago etc. R'y Co.*, 445.

3. **NEGLIGENCE — VALUE OF NURSE'S SERVICES.** — In an action to recover damages for personal injuries suffered through negligence, plaintiff may recover a fair compensation for necessary expenses incurred for nursing during a fixed period, without evidence of the value of such services. The jury may measure the same by its own knowledge and experience, and will be presumed to be reasonably familiar with the value of such services. *Murray v. Missouri etc. R'y Co.*, 601.
4. **MEASURE OF DAMAGES IN ACTION FOR FRAUDULENT REPRESENTATIONS OF TITLE.** — Where a party is induced by the false and fraudulent representations of another to exchange with him certain merchandise for three separate parcels of land, and the title to one of the parcels fails, the measure of damages is the market value of the property that he parted with. And in such case he is entitled to recover such proportion of the total value of the merchandise as the value of the tract of land to which the title failed bears to the aggregate value of the three tracts for which he traded. *Reynolds v. Franklin*, 540.
5. **VERDICT IS NOT EXCESSIVE** which allows eighteen thousand five hundred dollars for personal injuries to a boy seven years of age, making necessary the amputation of both his legs, and affecting him mentally as well as physically. *Heddles v. Chicago etc. R'y Co.*, 106.

See CARRIERS, 8, 9; INSURANCE, 31; LIBEL, 5-9; MASTER AND SERVANT, 22; TRESPASS.

DEATH.

See ASSOCIATIONS, 2; JOINT LIABILITY, 2; TRUSTS, 6, 7.

DECLARATIONS.

See AGENCY, 5.

DECREES.

See JUDGMENTS AND DECREES; MORTGAGES, 6.

DEDICATION.

See MUNICIPAL CORPORATIONS, 9.

DEED OF TRUST.

See DEEDS; MORTGAGES, 2; TRUSTS.

DEEDS.

1. **CONVEYANCE TO A WIDOW AND HER CHILDREN**, without naming them; vests the title in her and her children then in being as tenants in common. *Hobby v. Bunch*, 301.
2. **QUITCLAIM DEEDS.** — One who holds land under a quitclaim deed is not a *bona fide* purchaser, and takes only the interest which his grantor had, especially when he has notice or ready means of knowledge as to the real condition of the title. *Peters v. Cartier*, 508.
3. **TRUST DEED.** — EXECUTION AND DELIVERY of a trust deed intended as a settlement for the benefit of the grantor's children is shown when it appears that though the grantor was nominally one of the trustees named therein,

and retained possession of it, still he had it formally acknowledged and recorded, and recognized it in his subsequent will, and that the other trustee was present when it was executed, and consented to become one of the trustees therein and to act as such. *Huse v. Den*, 232.

See ESTOPPEL; EXECUTORS AND ADMINISTRATORS, 13, 14; FRAUDULENT CONVEYANCES; HUSBAND AND WIFE, 10, 11; INFANTS, 1; WILLS, 1.

DEFINITIONS.

"Accomplice." *Fort v. State*, 163.

"Agent." *Peterson v. Homan*, 564.

"Agent of the insurer." *State Ins. Co. v. Taylor*, 281.

Assumption of guilt. *Fort v. State*, 163.

Baggage. *Metz v. California S. R. R. Co.*, 228.

Bible-reading. *State v. District Board*, 41.

Bigamy. *Nelms v. State*, 377.

Bona fide purchaser. *Peters v. Cartier*, 508; *Van Raalte v. Harrington*, 626.

Breaking. *Kent v. State*, 376.

Contempt. *Ex parte Barry*, 248.

Creditor of estate. *Ohm v. Superior Court*, 245.

Cursing. *Carr v. Conyers*, 357.

"Dam." *Carr v. Conyers*, 357.

"Die without children of wife living." *King v. Frick*, 889.

"Died from disease." *Bacon v. Accident Ass'n*, 748.

Disqualified judge. *Blalock v. Waldrup*, 350.

Due process of law. *Bardwell v. Collins*, 547.

Estoppel *in pais*. *Huse v. Den*, 232.

Filing. *Marlet v. Hinman*, 102.

"False packed." *Miller v. Moore*, 329.

Fellow-servant. *Brown v. Gilchrist*, 496.

"Find." *State v. Lee*, 401.

Forcible entry. *Lissner v. State*, 389.

Functus officio. *Faull v. Cooke*, 836.

"Guilty." *State v. Lee*, 401.

House of ill-fame. *State v. Lee*, 401.

Lex rei sitae. *Lawrence's Estate*, 925.

Libel. *Muetze v. Tuteur*, 115.

"Look and listen." *McMarshall v. Chicago etc. R'y Co.*, 445.

"Look out." *McMarshall v. Chicago etc. R'y Co.*, 445.

"Loss of feet." *Sheanon v. Life Ins. Co.*, 151.

Hammer. *Georgia R. R. etc. Co. v. Nelms*, 308.

Holidays. *Spalding v. Bernhard*, 75.

Luggage. *Metz v. R. R. Co.*, 228.

Mutual benefit society. *Block v. Mut. Ins. Co.*, 166.

"Nebraska." *Nebraska etc. Co. v. Nine*, 686.

Negligence *per se*. *Murray v. R'y Co.*, 601.

"No. 2 white mixed corn, bulk." *Miller v. Moore*, 329.

"Not guilty." *State v. Lee*, 401.

Nuisance. *Briegel v. Philadelphia*, 885; *Arkadelphia v. Clark*, 154.

Nuncupative wills. *Scaife v. Emmons*, 383.

Officers of city. *Russell v. Tate*, 193.

Party-wall. *Harber v. Evans*, 646.

Quarreling. *Carr v. Conyers*, 357.

- "Reasonably safe." *Titus v. Bradford etc. R. R. Co.*, 946.
 "Recorder." *Owen v. Baker*, 618.
 Riparian rights. *Alta etc. Co. v. Hancock*, 217.
 Robbery. *Clements v. State*, 385.
 "Sectarian instruction." *State v. District Board*, 41.
 Seisin. *Savage v. Savage*, 795.
 Sham pleading. *Patrick v. McManus*, 253.
 Trespasser. *McMarshall v. Railway Co.*, 445.
 "Trustee." *Peterson v. Homan*, 564; *Marbury v. Ehlen*, 467.
 "Vacant or unoccupied." *Hotchkiss v. Ins. Co.*, 69; *McQueeney v. Ins. Co.*, 179.
 Volunteer. *Rhodes v. Railroad Co.*, 362.

DELIVERY BOND.

See ATTACHMENT AND GARNISHMENT, 8-10.

DESERTION.

See MARRIAGE AND DIVORCE, 6.

DEVISES.

See WILLS.

DISORDERLY CONDUCT.

See CRIMINAL LAW, 19.

DISORDERLY HOUSES.

See CRIMINAL LAW, 20-24; SALES, 1.

DISQUALIFICATIONS.

See JUDGES.

DIVIDENDS.

See ASSOCIATIONS, 2; CORPORATIONS, 8, 9.

DIVISIBILITY OF CONTRACTS.

See INSURANCE, 14-18.

DIVORCE.

See HUSBAND AND WIFE, 2; MARRIAGE AND DIVORCE.

DOCKS.

See WATERCOURSES.

DOUBLE AGENCY.

See AGENCY, 3.

DRAFTS.

See NEGOTIABLE INSTRUMENTS.

DRIVING PILES.

See NUISANCES, 1, 2.

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DRUGGISTS.

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DRUNKENNESS.

See NEW TRIAL, 1.

DUPLICITY.

See CRIMINAL LAW, 12.

DURESS.

See MARRIAGE AND DIVORCE, 1.

EASEMENTS.

See PRIVATE WAYS.

EJECTMENT.

1. IF THERE IS NO DEMISE in a declaration in ejectment from a particular person, no recovery can be had based upon his title. *Hobby v. Bunch*, 301.
2. DEMISE FROM A SHERIFF CANNOT support a recovery, for that officer does not acquire any title by his levying a writ upon the lands of another person. *Id.*
3. DEMISE TO A PARTICULAR PERSON WILL NOT SUPPORT A JUDGMENT IN EJECTMENT IF HE CONVEYED his title to the defendant before the action was brought. *Id.*

See PLEADING, 5.

ELECTRIC APPARATUS.

See MECHANIC'S LIEN, 1.

EMINENT DOMAIN.

CONSTITUTIONAL LAW — TAKING OF PROPERTY, WHAT FORBIDDEN. — Any restriction or interruption of the common or necessary use of property that destroys its value or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of the constitution. *Janesville v. Carpenter*, 123.

See WATERCOURSES, 3, 13.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT.

ENTICING AWAY HUSBAND.

See HUSBAND AND WIFE, 1.

ENTIRETY OF CONTRACTS.

See INSURANCE, 14-18.

EQUITY.

See JUDGMENTS AND DECREES, 8, 9; JURISDICTION, 1; MORTGAGES, 3; MUNICIPAL CORPORATIONS, 17-19.

ESTATES.

SEISIN AND POSSESSION MEAN THE SAME THING. — Seisin in fact consists of actual possession of the land. Seisin in law consists of the right of immediate possession according to the nature of the interest. Remaindermen or reversioners have neither. *Savage v. Savage*, 795.

ESTATES OF DECEDENTS.

See **EXECUTORS AND ADMINISTRATORS; TRUSTS, 8; WILLS.**

ESTATES FOR LIFE.

See **WILLS.**

ESTATES TAIL.

See **WILLS.**

ESTOPPEL.

ENCOURAGEMENT OF IMPROVEMENT NOT NECESSARY TO ESTOP WHEN. —

Where a person while under disability makes a deed, voidable because so made, and the grantee, after the removal of the grantor's disability, with the latter's knowledge, makes expenditures by placing improvements on the land, it is not necessary, to estop the grantor from disaffirming the deed, to show that he positively encouraged the improvements. *Logan v. Gardner*, 939.

See **AGENCY, 4; CARRIERS, 4; EXECUTORS AND ADMINISTRATORS, 8; HUSBAND AND WIFE, 3, 6-8; INFANTS, 1; INSURANCE, 3, 4, 8, 23, 30; JUDGMENTS AND DECREES, 11; NEGOTIABLE INSTRUMENTS, 2; OFFICERS, 6; PAYMENT, 2.**

EVIDENCE.

1. **HEARSAY.** — In an action to recover for personal injuries received in attempting to alight from a railroad train, statements made to a witness in the morning by the injured party, in response to inquiries as to how he had rested, are narrations of past transactions, hearsay, and inadmissible as evidence of the extent of suffering of the injured party. *Kelley v. Detroit etc. R. R. Co.*, 514.
2. **ONE WHO WAS IN ATTENDANCE ON AN INJURED PERSON**, and saw his condition and his apparent sufferings, may be asked to what extent he suffered. It does not require an expert to give testimony concerning the suffering of another who had been injured by an accident, and of whose apparent sufferings the witness was an observer for several days. *Heddles v. Chicago etc. R'y Co.*, 106.
3. **QUESTION AS TO WHAT WAS THE PLAINTIFF'S TEMPER** before he was injured is proper, because the answer tends to show his mental condition before he was injured. It is also competent to show his temper afterward, because a comparison of his temper before and after the accident may tend to show that it has resulted in a permanent mental defect. *Id.*
4. **NEGLIGENCE.** — **EVIDENCE THAT THERE WAS NO SIGN-BOARD AT A RAILWAY CROSSING** at which a traveler was injured is admissible in an action by him to recover compensation for such injury. *Id.*
5. **VENDOR AND VENDEE** — **PAROL EVIDENCE TO VARY CONTRACT OF SALE.** — When a contract for the sale of land calls for a quitclaim deed, and

provides that the vendee shall pay all taxes assessed on the land after a certain date, parol evidence is inadmissible to show a contemporaneous oral agreement that the vendor contracted to pay all taxes on the land assessed prior to such date, in the absence of claim or proof of any mistake or fraud in draughting the contract, or that it does not contain all that the parties intended should be inserted therein. *Gilbert v. Stockman*, 23.

6. **VENDOR AND VENDEE — PAROL EVIDENCE TO VARY CONTRACT OF SALE.** — Parol evidence cannot be admitted to vary or contradict the terms of a written contract for the sale of land complete in itself, nor to add a material condition to the contract as written. *Id.*
 7. **COURTS WILL TAKE JUDICIAL NOTICE OF CONTENTS OF BIBLE**, that the religious world is divided into numerous sects, and of the general doctrines maintained by each sect. *State v. District Board*, 41.
 8. **MEDICAL EXPERT CONSULTED AFTER THE COMMENCEMENT OF THE ACTION**, for the sole purpose of testifying on behalf of plaintiff, should not be permitted to testify to statements made by the latter as to his symptoms, pains, feelings, and condition, from the time of the injury to the time of consultation, especially when plaintiff is a competent witness, and has been sworn and examined in regard to the same matters. *Stewart v. Everts*, 17.
- See **CARRIERS**, 12-15, 17; **CRIMINAL LAW**, 13-18, 20-24; **FRAUDULENT CONVEYANCES**, 6, 7; **INSURANCE**, 13, 25, 26; **LIBEL**, 6-9; **MARRIAGE AND DIVORCE**, 2, 3; **MECHANIC'S LIEN**, 2; **SHERIFF'S DEED**, 2, 3; **USURY**, 1; **VENDOR AND VENDEE**, 1, 8, 13; **WITNESSES**.

EXCESSIVE DAMAGES.

See **DAMAGES**, 5.

EXECUTED CONTRACT.

See **HUSBAND AND WIFE**, 9.

EXECUTIONS.

1. **PRIORITY BETWEEN.** — An execution issued in good faith, to take property for the purposes of sale, and not merely to create a lien, will not be postponed simply because the goods were permitted by the officer to be sold under a subsequent execution. *Miller v. Getz*, 887.
2. **ABANDONMENT OF LEVY OF.** — A constable's levy is not abandoned merely because he gives his execution to a sheriff, who makes a subsequent levy, subject to that made by the constable, on the same goods, and then sells them. *Id.*
3. **LEVY AND SALE AFTER EXPIRATION OF RETURN DAY.** — A sheriff cannot hold an execution until long after the expiration of the return day, and until his term of office has expired, and then make a valid levy and sale thereunder. Such an execution is *functus officio*, confers no authority whatever, and any attempted levy and sale by virtue of it are nullities. *Faull v. Cooke*, 836.
4. **EXECUTION SALES — PROOF OF JUDGMENT ESSENTIAL.** — An execution, regular upon its face, emanating from a court of competent jurisdiction, will protect any officer who obeys it; but when a purchaser claims title under an execution sale, he must prove the judgment upon which the execution issued. *Id.*

5. **TITLE OF PURCHASER AT EXECUTION SALE PARAMOUNT TO ALL CONVEYANCES AND ENCUMBRANCES SUBSEQUENT TO JUDGMENT.** — Though a judgment creditor is not a purchaser within the recording acts, a purchaser under his judgment has all the qualities of one, by relation, from the date of the lien, and his title is paramount to all conveyances and encumbrances subsequent thereto. It is therefore incumbent on a party alleging a resulting trust in his favor antedating the entry of such judgment to show that the purchaser at the sheriff's sale had notice, actual or constructive, of the equitable title or resulting trust at the time of his purchase. *Lance v. Gorman*, 914.
6. **EXEMPTIONS.** — One who is temporarily residing in another state, but who has a domicile within the state of Arkansas, may claim his exemption of personal property from sale under process as provided by the constitution of that state. *Birdsong v. Tuttle*, 156.
7. **EXEMPTION — CONSTITUTIONAL LAW.** — A statute exempting from execution the defendant's wages, with limitations as to time and amount, is valid, if the amount of the exemption does not exceed the amount of personal property exempted by the constitution. *Id.*
8. **EXEMPTIONS — JUDGMENT FOR CONVERSION OF EXEMPT PROPERTY IS EXEMPT.** — A judgment against a sheriff for the wrongful conversion by him of property exempt from sale under execution is, together with costs, also exempt, and cannot be discharged by payment of the amount thereof to another sheriff, holding an execution against the exempt judgment debtor's property. A statute providing that "after the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of the debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid," does not include, and should not be applied to, a judgment for the value of exempt property. *Below v. Robbins*, 89.
9. **EXEMPTION FROM, NECESSITY FOR CLAIMING.** — Under the statutes of Colorado declaring that certain property up to a value specified shall be exempt from levy and sale upon any execution or writ of attachment, and that if any officer shall take or seize any of the articles or property so exempt, he shall be liable for three times the value of the property illegally taken or seized, if the property levied upon by the officer is all the debtor has, and is within the exemption, he need not indicate, either directly or indirectly, that the property is exempt, nor make any demand for its exemption. If, however, the defendant has property of a certain kind in excess of the exemption, it is his duty to interpose his claim for exemption prior to the sale, provided he is notified of the levy, and is in a position to interpose such a claim. *Harrington v. Smith*, 272.
10. **EXEMPTION, WAIVER OF.** — A debtor absent in another state when informed of a levy on his exempt property, where the property is such that it is the duty of the officer not to levy upon it, does not waive his right of exemption by writing a letter to the officer levying the writ, stating that it was impossible for him to come home, and requesting postponement of the cause until a day specified, when he could come home and fix up everything satisfactorily, though he did not return at the day indicated, and the officer did not sell the property until a subsequent date. *Id.*
11. **LEVY ON EXEMPT PROPERTY — APPLICATION OF PROCEEDS.** — The proceeds of exempt property levied upon to satisfy a judgment containing

no waiver of exemptions, and afterwards levied upon and sold under a judgment containing such waiver, will be applied to the payment of the first judgment, under the rule that a waiver as to any lien will inure to the benefit of all prior liens. *Miller v. Getz*, 887.

See ATTACHMENT AND GARNISHMENT, 7-10; REPLEVIN, 3; SCIRE FACIAS.

EXECUTION SALES.

See EXECUTIONS.

EXECUTORS AND ADMINISTRATORS.

1. **CONFLICT OF LAWS. — AN ADMINISTRATOR HAS NO RIGHTS OR POWERS NOT GIVEN OR IMPOSED** by the laws of the state in which he is appointed, and therefore cannot, in such state, sustain an action for the death of his intestate, where his right to do so is founded solely on the statute of another state, and the statutes of his own state would not have sustained the recovery had the facts constituting the cause of action occurred therein. *Ash v. Baltimore etc. R. R. Co.*, 461.
2. **ESTATES OF DECEDENTS — WHO IS NOT CREDITOR OF ESTATE. —** A person whose claim against an estate has been disallowed by the administrator, and for the establishment of which, as a claim, an action is pending and undetermined, is not a creditor within the meaning of section 1590 of the California Code of Civil Procedure, providing for suits in certain cases by executors and administrators to set aside fraudulent conveyances on application of creditors. *Ohm v. Superior Court*, 245.
3. **ESTATES OF DECEDENTS — CREDITOR'S SUIT TO SET ASIDE DEED — STATUTE OF LIMITATIONS. —** To enable a creditor of an estate to maintain suit to set aside as fraudulent and void a deed made by the intestate, he must be a creditor whose claim has been allowed by the administrator, or is evidenced by a judgment; and the statute of limitations does not bar an action by the creditor until three years after the judgment establishing his claim. *Id.*
4. **ESTATES OF DECEDENTS — CERTIORARI TO ANNUL ORDER MADE WITHOUT AUTHORITY. —** An order of a trial court directing an alleged creditor of an estate to prosecute an action in the name of the administrator to set aside as void a conveyance by the intestate is without authority of law, and may be reviewed and annulled on *certiorari*. *Id.*
5. **ESTATES OF DECEDENTS — CREDITOR'S SUIT TO SET ASIDE CONVEYANCE — REMEDY OF CREDITOR. —** A creditor of an estate has his remedy by action in his own name, independently of the administrator, to set aside as void a conveyance made by the intestate; or the court may compel the administrator to bring the suit in a proper case, and compel obedience to its mandate by punishing him for contempt, upon his refusal to sue; or it may revoke his letters and appoint an administrator who will prosecute the action. *Id.*
6. **VALIDITY OF PRIVATE SALE OF LAND. —** Private sale of land of a decedent by his administrator, upon order of the probate court, for the payment of the decedent's debts, is not void when confirmed. *Apel v. Kelsey*, 183.
7. **ESTATES OF DECEDENTS. — SALE BY EXECUTOR WITHOUT ORDER OF COURT** under a will containing no power to him to so sell is void. *Huse v. Den*, 232.
8. **VOID EXECUTOR'S SALE — ESTOPPEL IN PAIS. —** A purchaser at a void executor's sale can claim no estoppel *in pais* against the heirs from

acquiescence, when the truth concerning material facts affecting the title was not unknown to him, or he did not lack the means of discovering it. *Id.*

9. VOID EXECUTOR'S SALE — SUBROGATION. — Purchaser at a void executor's sale, with knowledge that the land is subject to a trust, and of the want of power of the executor to sell, is not entitled to subrogation against the heirs, especially when he has made his payments to the executor and trustees, who have used the money indiscriminately with other moneys, received from sales of personal property and other land for various purposes. *Id.*
10. VOID EXECUTOR'S SALE — IMPROVEMENTS. — In an action to recover land from the purchaser at a void executor's sale, no allowance can be made for improvements except as an offset for damages claimed for withholding the possession. This under section 741, California Code of Civil Procedure. *Id.*
11. EXECUTORS AND ADMINISTRATORS, SALES BY, PRESUMPTIONS IN FAVOR OF. — One who claims under an administrator's deed need only produce the deed, order of sale, and order of court approving the sale, to raise the presumption that the requisite antecedent steps for the sale were taken; and where the administrator may purchase at his own sale by paying not less than three fourths of the appraised value of the property, it will also be presumed, in the absence of evidence to the contrary, in favor of a purchaser from him, that he complied with the law. *Price v. Springfield R. E. Ass'n*, 595.
12. EXECUTORS' AND ADMINISTRATORS' SALES — APPROVAL AT SUBSEQUENT TERM. — When an administrator's sale is not required to be approved at the term of court when made, its approval at a subsequent term is not irregular. *Id.*
13. EXECUTORS' AND ADMINISTRATORS' SALES — EFFECT OF RECITAL IN DEED. — Where the statute does not require an administrator's deed to recite the time and place of sale, nor that it was made during the session of a certain court, the order of court approving the sale is better evidence that it was made at the proper time and place than a recital to the contrary in the deed. Such recital may therefore be disregarded as a clerical mistake. *Id.*
14. EXECUTORS' AND ADMINISTRATORS' SALES, PRESUMPTION IN FAVOR OF. — If an administrator's sale was made nearly forty-three years before suit was brought in ejectment, and the claimant under such sale has paid taxes on the land and exercised acts of ownership over it for twenty years before suit, it will be presumed that the administrator did his duty according to law, and such presumption is not overcome by unnecessary recitals in his deed. *Id.*

See CORPORATIONS, 8.

EXECUTORS' SALES.

See EXECUTORS AND ADMINISTRATORS, 6-12.

EXECUTORY CONTRACTS.

See VENDOR AND VENDEE, 5.

EXEMPTIONS.

See ATTACHMENT AND GARNISHMENT, 4-7; EXECUTIONS, 6-11; HOMESTEAD; JUDGMENTS AND DECREES, 15.

EXPERTS.

See EVIDENCE, 2, 8; MASTER AND SERVANT, 15; WITNESSES, 2.

EXPULSION OF MEMBERS.

See ASSOCIATIONS, 3-3.

EXTINGUISHMENT.

See WATERCOURSES, 3-5.

EXTRADITION.

ARREST ON CIVIL PROCESS. — Where a non-resident has been brought within the jurisdiction of a court upon a requisition to answer to a criminal charge as a fugitive from justice, and has been tried for or discharged as to the crime charged against him, he is not subject to arrest on civil process, until a reasonable time and opportunity have been given him to return to the state whence he was taken. *Moletor v. Sinsen*, 71.

FALSE REPRESENTATIONS.

See VENDOR AND VENDEE, 13-15.

FEE-SIMPLE.

See WILLS.

FELLOW-SERVANTS.

See MASTER AND SERVANT, 17-21.

FILING.

See CHATTEL MORTGAGES, 1.

FINDINGS.

See TRIAL, 5.

FIRE.

See NEGLIGENCE, 9.

FIRE INSURANCE.

See INSURANCE, 1-31.

FIREMAN.

See MUNICIPAL CORPORATIONS, 14.

FORCIBLE ENTRY AND DETAINER.

See CRIMINAL LAW, 25.

FORECLOSURE.

See MECHANIC'S LIEN, 4; MORTGAGES, 4-8.

FOREIGN INSURANCE COMPANIES.

See INSURANCE, 1.

FOREIGN JUDGMENT

See JUDGMENTS AND DECREES, 21.

FOREMAN.

See MASTER AND SERVANT, 20. 21.

FORGERY

See INSURANCE, 32.

FRAUD.

See CHATTEL MORTGAGES, 2; FRAUDULENT CONVEYANCES; HUSBAND AND WIFE, 5; JUDICIAL SALES; MARRIAGE AND DIVORCE, 5; PAYMENT, 2; VENDOR AND VENDEE, 2-15.

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCE OF HOMESTEAD, WHAT IS NOT. — A conveyance by a debtor of his homestead, not subject to a judgment lien or sale under execution, is not fraudulent as to his creditors, though executed with a bad motive. *Bogan v. Cleveland*, 158.
2. DEED NOT FRAUDULENT AT FIRST may become so afterwards by being concealed, or not pursued, the grantor remaining in possession, by which means creditors have been drawn in to lend their money. *Steele v. Coon*, 705.
3. DEED EXECUTED BY ONE FREE OF DEBT, but concealed and not recorded, is fraudulent and void as to subsequent creditors of the grantor. *Id.*
4. HUSBAND AND WIFE. — CONVEYANCES BETWEEN husband and wife, by the aid of a third person, will be closely scrutinized, but are not necessarily fraudulent as to creditors, and may be deemed valid to the extent of the consideration passing, which will not include the value of a homestead conveyed as part of the transaction, and the remainder, to vest in the heirs of the holder of the general title thereto, will not be considered as adding to such consideration. *Id.*
5. RELATIONSHIP BETWEEN INSOLVENT DEBTOR and preferred creditor is a fact to be considered by the jury on the question of intent to defraud creditors. *Van Raalte v. Harrington*, 626.
6. DIRECT OR POSITIVE EVIDENCE of knowledge or notice by a vendee of his vendor's intended fraud on creditors is not required, but may be inferred by the jury from circumstances. While facts which would put a prudent person upon inquiry will be evidence from which the inference may be drawn, still the jury must be left to draw the inference. *Id.*
7. BONA FIDE PURCHASER FOR VALUE. — When a sale of goods is attacked as fraudulent, against the creditors of the vendor, and the vendee has paid a valuable consideration and has taken immediate possession, the burden of proof is on the attacking creditor to show affirmatively that the vendee was not a *bona fide* purchaser, and that he in some way participated in the intended fraud. Proof that he purchased with notice of facts sufficient to put a prudent man on inquiry is not sufficient to charge him with constructive notice of the fraud. *Id.*
8. VENDEE'S NOTICE OF FRAUDULENT INTENT. — Where the vendee has paid a valuable consideration, and it is sought to avoid the sale on the ground that he had notice or knowledge of a fraudulent intent on the part of the

vendor, the question to be determined by the jury is, whether he had knowledge or notice of the fraudulent purpose of the vendor, and not whether he had knowledge of facts which would put a prudent person on inquiry and lead to a discovery of the fraud. *Id.*

9. FRAUDULENT CONVEYANCES, SETTING ASIDE. — Mere inadequacy of price is not alone sufficient to warrant a court in setting aside a sale and a conveyance made in pursuance thereof. *Hammond v. Wallace*, 239.

See CORPORATIONS, 11-15; EXECUTORS AND ADMINISTRATORS, 3, 5; MORTGAGES, 4.

FRAUDULENT REPRESENTATIONS.

See DAMAGES, 4.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT; NEGOTIABLE INSTRUMENTS, 7.

GRANTS.

See WATERCOURSES, 15.

GROWING CROPS.

See MORTGAGES, 2.

GROWING GRASS.

See HIGHWAYS, 1.

GUARDIAN AD LITEM.

See INFANTS, 2.

GUESTS.

See INNKEEPERS.

GUILTY KNOWLEDGE.

See CRIMINAL LAW, 26.

HEARSAY.

See CRIMINAL LAW, 16, 17; EVIDENCE, 1.

HIGHWAYS.

1. RIGHT TO GRASS GROWING IN. — When, upon a public highway, the travel has been in a uniform beaten track, leaving grass to grow and ripen undisturbed upon the sides of such track, no one but he who owns the fee has the right to harvest it, and he cannot only maintain trespass or trover against any person cutting and taking it away against his will, but he has the right to protect it against wanton or malicious damage or destruction, whether it is attempted to be done under the guise of travel upon the highway or in some other way. *People v. Foss*, 532.
2. ONE WHOSE LAND ABUTS UPON A PUBLIC STREET OR HIGHWAY, though he has no fee in the land occupied by such street or highway, has rights therein not held in common with the general public for the purposes of travel and use; and a party using or appropriating any part of the high-

way for other or different purposes than those contemplated, whereby it is obstructed and impaired as a means of ingress and egress, is liable to such owner for any consequent damages arising from such appropriation and use depreciating the value of the property. *Longmont v. Parker*, 277.

3. ACTION MAY BE SUSTAINED BY ONE WHOSE LANDS ABUT ON A PUBLIC HIGHWAY, against a municipal corporation which excavates and maintains a ditch in such highway in front of his premises, though he has no interest in the fee of the land in which the highway is located. *Id.*

See TELEPHONE COMPANIES.

HOLIDAYS.

1. LEGAL HOLIDAYS, VALIDITY OF JUDICIAL ACTS ON. — The approval of the bond of an assignee for the benefit of creditors, by a court commissioner, on a legal holiday, assuming it to be the exercise of a judicial act, is nevertheless valid within the meaning of a statute which prohibits any court from being open or transacting any business on legal holidays. *Spalding v. Bernhard*, 75.
2. LEGAL HOLIDAYS ARE NON-JUDICIAL DAYS ONLY WHEN MADE SO BY STATUTE, and then only so far as they are expressly made so. In all other cases, the doing of judicial acts on such days is valid. *Id.*

HOMESTEAD.

HOMESTEAD IN PUBLIC LANDS — EXEMPTION OF LAND AND IRRIGATING DITCHES THEREON. — A homestead in public lands, claimed and perfected under the United States statute, is exempt from liability for debts contracted prior to the issuing of the patent therefor; and necessary ditches, and the water in them flowing over such land, and used for irrigation purposes as part of the land itself, and not severable therefrom, are also exempt. *Faull v. Cooke*, 836.

See FRAUDULENT CONVEYANCES, 1; PUBLIC LANDS.

HOTEL CLERK.

See NEGLIGENCE, 1.

HOTELS

See INNKEEPERS.

HOUSES OF ILL-FAME.

See CRIMINAL LAW, 20-24.

HUSBAND AND WIFE.

1. WIFE'S RIGHT OF ACTION FOR LOSS OF HUSBAND'S SOCIETY AND SUPPORT. — A wife cannot, either at common law or under the statutes of Wisconsin, maintain an action against one who entices away her husband. *Duffies v. Duffies*, 79.
2. SEPARATE SUIT FOR ALIMONY and support may be maintained by the wife in equity, independent of a suit for divorce. *Earle v. Earle*, 667.
3. PARTIES. — MARRIED WOMAN SUING ALONE FOR INJURY TO HER LAND is entitled to recover, notwithstanding her failure to prove title or possession in herself, when the husband's testimony is such as to estop him, if

the real owner, from recovering for the same cause of action. *Lord v. Meadville Water Co.*, 864.

4. **MARRIED WOMAN MAY EMPLOY HER HUSBAND AS AGENT, AND AGREE TO COMPENSATE HIM, WHEN.** — A married woman who is possessed of a separate estate, and is engaged in conducting a separate business, may employ her husband as her agent to carry on such business, and has the right to compensate him for his services. *Third Nat. Bank v. Guenther*, 780.
5. **WIFE MAY, IN ASSIGNMENT, PROVIDE FOR COMPENSATION SHE AGREED TO PAY HER HUSBAND.** — Compensation which a married woman has agreed to pay to her husband for services rendered by him in carrying on her separate business is a moral obligation which she can voluntarily pay or provide for in an assignment for the benefit of her creditors, without furnishing any legal or just ground for complaint on the part of her other creditors, provided the transaction is free from actual fraud. *Id.*
6. **MARRIED WOMAN OF FULL AGE WHO BECOMES DISCOVERT MAY BE ESTOPPED** by her acts, the same as other persons *sui juris*. *Logan v. Gardner*, 939.
7. **MARRIED WOMAN BOUND TO OBSERVANCE OF GOOD FAITH IN HER DEALINGS.** — A married woman, in her dealings with the world, is held to the observance of that good faith to which others are bound; the protection which her coverture affords her is for the prevention of fraud, and she ought not to be thereby enabled to defraud others with impunity. *Bucknor's Estate*, 891.
8. **NOTE OF MARRIED DAUGHTER CHARGEABLE AGAINST HER SHARE OF HER MOTHER'S ESTATE WHEN.** — Where a married woman, while incapacitated by her coverture from contracting a loan of money, borrows money from her mother, giving her promissory note therefor, and the mother afterwards dies intestate, and the daughter repudiates her note, the orphans' court in distributing the estate should charge the amount of the note against the share of the daughter. The daughter, though not technically a bailee of the money for the estate, is bound in equity and good conscience to return it, and the orphans' court, which is practically a court of equity, may regard the money as the money of the estate in her hands, and make the distribution upon that basis. *Id.*
9. **AGREEMENT TO SUPPORT FAMILY, RIGHT OF MARRIED WOMAN TO PERFORM.** — An agreement by a married woman, with her husband, to support the family, although not enforceable against her so long as it remains executory, may be rightfully performed by her; and if she was perfectly solvent when she entered into it, without any fraudulent intent, and she has performed it, she cannot undo what has been done by recalling what she has paid, or require the husband to reimburse her for the outlay. *Third Nat. Bank v. Guenther*, 780.
10. **MARRIED WOMAN CAN ONLY PASS HER TITLE TO LAND IN STATUTORY MODE.** — A married woman can only pass her title to real estate in the statutory mode; and therefore a party claiming under a deed from her and her husband, which is alleged to be lost, must show that it was executed and acknowledged as required by the statute. *Logan v. Gardner*, 939.
11. **DISABILITIES OF COVERTURE AND INFANCY ARE SEPARATE AND INDEPENDENT**, and the mere fact that they both occur in connection with the same act does not give either of them any greater force than it would have had separately. If, therefore, an infant *feme covert* has executed a deed

properly, the only objection the party relying on it has to meet is that of infancy. *Id.*

See CRIMINAL LAW, 4; FRAUDULENT CONVEYANCES, 4; INSURANCE, 32.

IMMUNITY FROM PROCESS.

See EXTRADITION; PROCESS, 4, 5.

IMPROVEMENTS.

See ESTOPPEL; EXECUTORS AND ADMINISTRATORS, 10; MORTGAGES, 6, 7.

INDICTMENT.

See CRIMINAL LAW, 11, 12, 24.

INDORSEMENT.

See NEGOTIABLE INSTRUMENTS, 3.

INFANTS.

1. DEED OF INFANT IS VOIDABLE ONLY; the title passes by it, and remains in the grantee until some clear act of disaffirmance is done by the grantor after coming of age, and he may affirm it by much less formal acts than would be sufficient to avoid it, and clearly by any act which amounts to an estoppel. *Logan v. Gardner*, 939.
2. JURISDICTION. — Service of process upon a minor will not compel his appearance, after arriving at age, nor will the appointment of a guardian *ad litem* confer jurisdiction as to such minor when the guardian expressly declines to act. *Welch v. Agar*, 380.

See HUSBAND AND WIFE, 11; NEGLIGENCE, 14, 15.

INJUNCTIONS.

1. INJUNCTION NOT GRANTED TO RESTRAIN VIOLATION OF CONTRACT TO WHICH DEFENDANT IS NEITHER PARTY NOR PRIVY. — Where the owner of a block leases a portion thereof to a lessee, with an agreement not to let any other portion of the block for the same purpose, such lessee will not be entitled to an injunction to restrain subsequent lessees of other portions of the block from the enjoyment of their lease, they being neither parties nor privies to the former contract. *Napa V. Wine Co. v. Boston B. Co.*, 562.
2. INJUNCTION NOT GRANTED WHERE PLAINTIFF SHOWS NO APPRECIABLE INJURY TO HIMSELF. — In a suit by an adjoining lot-owner to enjoin the erection of a bay-window projecting into the street, an injunction will not be granted, where it is not shown that the plaintiff would suffer any appreciable injury from the structure sought to be enjoined. *Livingston v. Wolf*, 936.

See NUISANCES, 1-4; PARTY-WALLS, 2; PRIVATE WAYS, 3; RELIGIOUS SOCIETIES; TRADE-MARKS.

IMPEACHMENT.

See WITNESSES.

INNKEEPERS.

1. LIABILITY FOR BAGGAGE. — An innkeeper is not an insurer of the safety of baggage delivered to him to be held as a pledge for money loaned, or

for accommodation, by a guest after he has severed his personal connection with the hotel by surrendering his room and paying his bill. *Wear v. Gleason*, 186.

2. **LIABILITY FOR ACTS OF HIS PORTER.** — If the porter of a hotel receives, at a railway depot, checks for the baggage of a traveler who intends to and does become the guest of the hotel, its proprietor cannot escape liability on showing that the duties of the porter were restricted to advertising the hotel and suggesting it to strangers, unless he can also show that the guest was aware of such restriction. *Coskery v. Nagle*, 333.
3. **INNKEEPER BECOMES RESPONSIBLE FOR HIS GUEST'S BAGGAGE FROM THE MOMENT THE TRAVELER CONVEYS IT TO THE HANDS OF A PORTER** of the hotel, though the latter, in the presence of the guest, confides the check for the baggage to a transportation company to be taken to the hotel, and it never reaches there, if the guest did not know that the person to whom the porter delivered the check was not a representative of the hotel. *Id.*
4. **INNKEEPER EMPLOYING A TRANSPORTATION COMPANY TO FURNISH AN OMNIBUS AND WAGON** to receive guests of the hotel at a railway depot, and to transport them and their baggage to the hotel, is liable if the baggage of a guest delivered to such company is by it lost before reaching the hotel. *Id.*
5. **LIABILITY TO GUEST, WHEN COMMENCES.** — When a traveler arrives at a depot and is met by one who is the porter of an inn, who indicates to the traveler a certain conveyance in which he can go to such inn, and the traveler delivers to him his baggage, or the check therefor, the traveler becomes thereby a guest of such inn so far as to render the proprietor thereof liable for the safe-keeping or redelivery of the baggage; the liability of the proprietor commences from the time of the delivery of the baggage or check to the porter. Any private arrangement between the landlord and the carrier for the transportation of persons and baggage to his house does not affect the traveler, who has the right to assume, without any knowledge to the contrary, that such carrier is in fact authorized by the proprietor of the house to safely and securely transport himself and his baggage; and when a loss occurs by the negligence of such carrier, the proprietor of the house is liable to the traveler. *Id.*

INQUISITION OF LUNACY.

See CONSPIRACY.

INSANITY.

See MARRIAGE AND DIVORCE, 4, 5.

INSOLVENT CORPORATION.

See CORPORATIONS, 11-15.

INSTRUCTIONS.

See CRIMINAL LAW, 1, 27, 28; DAMAGES, 1, 2; RAILROAD COMPANIES, 3; TRIAL, 7, 8.

INSURANCE.

1. **VALIDITY OF POLICY ISSUED IN VIOLATION OF LAW.** — A fire insurance policy issued by an insurance company organized under the laws of

one state, upon property in another state, without a compliance with the laws of the latter state, providing that foreign insurance companies which issue policies on property in that state without complying with its laws are liable to a penalty, but imposing no duty or prohibition on the person so insured, is valid and binding on the company. *Pennypacker v. Capital Ins. Co.*, 395.

2. **CONSTRUCTION OF CONTRACT — POWER OF AGENTS.** — Contracts of insurance must have effect like all other written contracts. The intention of the parties must govern, and when the language is plain and unambiguous, such intention must be gathered from such language. The court simply ascertains the language the parties themselves have agreed to and have written in their contract, and enforces it according to its legal effect, and when an insurance agent's authority is limited, and the party with whom he contracts has notice of such limitation, under no circumstances can the principal be bound beyond the agent's authority. *Weidert v. State Ins. Co.*, 809.
3. **POWER OF AGENT — ESTOPPEL AGAINST INSURED.** — Where a policy of insurance itself contains an express limitation upon the power of the agent, he has no right to contract, as against the company, with the party to whom the policy has been issued, so as to change its terms, or to dispense with the performance of any part of the consideration, either by parol or in writing, and the insured is estopped by accepting the policy from setting up powers in the agent at the time in opposition to the conditions and limitations in the policy. *Id.*
4. **POWER OF AGENTS.** — Insurance agents at a distance from their principals are either general or special agents possessing either plenary or limited powers, depending upon the terms of the grant of power exercised with the assent of the principals, and the extent of their authority is to be determined by the same rules that control in respect to other agencies. If the assured has knowledge of the limited powers of such agent, he is estopped from claiming that such limitation does not exist, or in hostility to it. *Id.*
5. **POWER OF SPECIAL AGENT, INSURED MUST TAKE NOTICE OF.** — An insurance company may limit the power of its agent, and when such notice as a prudent man is bound to regard is brought home to the assured, limiting the power of such agent, he relies upon any act in excess of such limited power at his peril. In the case of a special agent, the assured must, at his peril, know whether the act relied upon is within the scope of his real or of his apparent authority. *Id.*
6. **POWER OF AGENT TO BIND COMPANY AS TO CONSTRUCTION OF POLICY.** — Where a foreign insurance company, through its local agent, insures a dwelling-house and the personal property therein, under a policy providing that the house shall "be occupied by the assured or tenant," and that it shall become void if the house becomes "vacant or unoccupied," the company is bound by a statement made by the agent to the assured, at the time that the tenant ceased to occupy the insured premises, that the insurance would hold good for thirty days thereafter, and that the house would be considered as occupied while the personal property remained therein, and this, notwithstanding the policy provides that the agent has no authority to change any of its conditions or restrictions by parol. *Hotchkiss v. Phoenix Ins. Co.*, 69.
7. **AGENT, WHO DEEMED ACTING FOR.** — Agent for the purpose of soliciting insurance, sending application to the insurer, obtaining policies, and

- delivering them to the assured, and collecting premiums, is, in filling out and forwarding applications, the agent of the insurer, and if any error is committed or misstatement made by him, the assured should not suffer therefor. *State Ins. Co. v. Taylor*, 281.
8. **INSURANCE COMPANY ESTOPPED TO DENY THAT INSURED OWNED PROPERTY WHEN.** — Where a person, after candidly stating to a representative of an insurance company what his title to property is, is advised by such representative to insure the property, in which he has an interest, in his own name as owner, and acts upon this advice, the company will be estopped from defending an action on the policy on the ground that his interest in the property does not amount to ownership. *Burson v. Fire Ass'n*, 919.
 9. **INSURANCE ON A FARM-HOUSE DESCRIBED AS THE RESIDENCE OF THE ASSURED** is not avoided by the fact that the assured also kept an inn or public house, if the character of the house was not changed after the insurance was effected, and was then known to the agent of the insurer. *State Ins. Co. v. Taylor*, 281.
 10. **INCREASE IN RISK RESULTING FROM ADJACENT PREMISES**, over which the assured has no control, will not avoid a policy of insurance, though it declares that if the "hazard is increased without the consent of the company in writing, the policy shall be void." This condition applies only to the insured premises, or to property under the control of the assured. *Id.*
 11. **SOLE AND UNCONDITIONAL OWNER OF INSURED PROPERTY, WHO IS.** — A person in whom the entire legal title to property is vested at the time an insurance thereon is effected is the sole and unconditional owner thereof within the meaning of the policy, notwithstanding the insured had made a lease or bill of sale of the property, reserving title until full payment of the consideration; and the insurer has no standing to assert that the transaction was a legal fraud. The insured may recover from the company the full amount named in the policy upon the destruction of the property by fire, although the lessee had partly paid for them, as such payment did not transfer to him the title *pro tanto*. *Burson v. Fire Ass'n*, 919.
 12. **OCCUPANCY.** — Where a policy of insurance on a dwelling-house contains a provision that the policy shall become suspended if the property becomes vacant or unoccupied, "occupied," within the meaning of the policy, means that the dwelling-house must be used by human beings as their place of abode. The fact that after such house became vacant the insured or his hired men or some member of his family visited the house every day to see that things were all right is not an occupancy within the meaning of such policy. *Weidert v. State Ins. Co.*, 809.
 13. **EVIDENCE OF RESIDENCE.** — Where the assured owns two houses, only one of which is insured, and there is sufficient furniture in either for the purposes of a residence, evidence as to whether or not the insured building contained less furniture at the time of the loss than was in the uninsured house is too remote to be admissible to establish the fact of residence or occupancy. *Id.*
 14. **WHEN CONTRACT IS ENTIRE.** — The general rule applies to insurance policies, that where the amount of insurance is apportioned to distinct items, but the premium paid is gross, the contract is entire. *McQueeny v. Phoenix Ins. Co.*, 179.
 15. **WHEN CONTRACT IS ENTIRE.** — Where an insurance policy provides that "if, during this insurance, the premises shall become vacant or

unoccupied, then, so long as the same shall remain vacant and unoccupied, this policy shall cease and be of no force," and the property insured for separate sums, in consideration of the payment of a gross premium, consists of two houses, thirty feet apart, in the same inclosure, one of which was occupied as a residence, the other vacant, at the time of loss, the premises insured consist of both houses within the meaning of the policy, and the policy is not suspended so long as either of them is occupied. *Id.*

16. **CONTRACT OF INSURANCE, WHEN INDIVISIBLE.** — Though insurance is distributed to the different items of insured property, the contract is indivisible if its breach as to one item of the property affects, or may reasonably be supposed to affect, the other items by increasing the risk thereon. *Loomis v. Rockford Ins. Co.*, 96.
17. **CONTRACT OF INSURANCE, WHEN DIVISIBLE.** — If three houses, and their contents, situate on different farms, are insured, each for a separate amount, by a policy stating the premium as a gross sum, the contract is divisible, so that if there is a breach of condition as to one of the houses, by its conveyance without the assent of the insurer, the policy is not thereby avoided as to the other houses. A recovery should be had in all those cases where the contract is divisible and the different properties are insured for separate sums, and the risk upon some of the property is not affected by the cause which rendered the policy void in part. *Id.*
18. **ENTIRETY OF CONTRACT — FORFEITURE AS TO PART.** — A fire insurance policy for which a gross premium is paid, and which covers real estate and various classes of personal property, the latter not specifically named, is not entire, and although a mortgage is given on the real estate in violation of a condition in the policy, this will not bar a recovery for the loss of the personal property; nor will mortgages on the latter, executed subsequent to the issuance of the policy, prevent a recovery for the loss, if they were paid and canceled prior to the destruction of the property. *State Ins. Co. v. Schreck*, 696.
19. **EVIDENCE, OBJECTIONS TO.** — In an action upon an insurance policy to recover for the loss of personal property, where payment is resisted on the ground that the property was mortgaged subsequently to the issuance of the policy and in violation of the conditions thereof, and the insurer himself proves that such mortgages were paid and canceled prior to the loss, and the jury so find, he cannot afterwards object that the evidence was insufficient to support the finding, nor that it was incompetent or immaterial under the issue joined. *Id.*
20. **PROOF OF NOTICE OF LOSS.** — Under a policy of fire insurance not requiring notice of loss to be written or given to any particular person, uncontradicted evidence that two of the company's agents were at the fire, that they received and agreed to give notice of the loss to the company, and that soon thereafter the company's adjuster came and adjusted the loss, is sufficient proof of notice of loss, and of the agency of the parties mentioned as agents and adjuster. *Id.*
21. **DESCRIPTION OF PROPERTY — VARIANCE.** — Where the insured property is situated on the northwest quarter of a certain section of land, instead of the northeast quarter thereof, as described in the policy, the variance is not material, and the insured is not compelled, in case of loss, to seek a reformation of the policy in equity, before he can recover in a court of law. *Id.*

22. **PROOF OF LOSS.** — Where a policy of insurance makes certain proofs to be furnished by the assured in case of loss conditions to be complied with by him before he has any claim against the company, he must comply with such conditions substantially, if not strictly, before he can recover. Failure to make such proof may, however, be waived by the company. *Weidert v. State Ins. Co.*, 809.
23. **TO CONSTITUTE WAIVER** which will prevent the insurer from relying on the terms of the policy, there must be some act which amounts to an estoppel. The company must either itself, or by some act of its agent having real or apparent authority, do or say something that induces the assured to do or forbear to do something whereby he is prejudiced. *Id.*
24. **CONDITIONS — PROOF OF LOSS.** — When failure to comply with conditions in a policy relating to proof of loss is due wholly to the fault of the insured, the policy is dead, and cannot be revived by anything short of a new consideration and an express waiver on the part of the insurers. If no proofs of loss are served in time, and the insurer has done nothing to induce the omission, the insured loses all rights under the policy, and the insurer is not bound to specify his defenses, nor does he waive those not specified. *Id.*
25. **EVIDENCE OF NOTICE AND PROOF OF LOSS.** — In an action to recover on a fire insurance policy, the insured may show notice and proof of loss by evidence that he procured the policy through certain persons not agents of the insurer, that he mailed notice and proof of loss to them, and that they received and mailed them to the insurer. *Pennypacker v. Capital Ins. Co.*, 395.
26. **PRESUMPTION OF RECEIPT OF NOTICE AND PROOF OF LOSS.** — Evidence of due mailing of notice and proof of loss properly addressed to the insurer raises a presumption that they were duly received by him, but such presumption may be overcome by evidence. *Id.*
27. **NOTICE OF LOSS.** — A condition in a policy of fire insurance that notice of loss must be given forthwith is synonymous with a condition that such notice must be given within a reasonable time. *Id.*
28. **NOTICE AND PROOF OF LOSS. — FINDING BY JURY** that notice and proof of loss were furnished the insurer within the time provided by the policy will not be disturbed when the evidence on that point is conflicting. *Id.*
29. **INSURED MAY ASSUME NEW POLICY TO BE LIKE OLD ONE WHEN.** — If an agent of an insurance company in arranging with an owner of goods for a renewal of a policy thereon informs such owner that he will make him another policy like the first one, but that the company will only give him a receipt, and not make a new policy for him, the insured has a right to suppose that a policy afterwards delivered to him under this arrangement is essentially similar to the original policy; and he will not be bound by a warranty clause in it that he did not know of, and which was not in the first policy. *Burson v. Fire Ass'n*, 919.
30. **APPLICATION — PLEADING.** — The fact that a complaint on a policy of insurance, in setting forth the policy, annexes a copy of the application indorsed thereon, does not amount to an assertion that the application is correct, nor estop plaintiff from showing that it was written by defendant's agent, is not correct, and was not made, submitted to, nor signed by plaintiff. *State Ins. Co. v. Taylor*, 281.
31. **DAMAGES.** — When an insured building is destroyed, the damages recoverable on the policy are not limited to the amount for which the build-

ing could have been sold. The true measure of damages is indemnity to the assured, not exceeding the sum insured. In determining the amount of such indemnity, the cost of replacement is not the only criterion. The jury must take into consideration the age and condition of the building, and if by reason of age or use it is less valuable than a new building erected upon the same plan, of similar materials and of the same dimensions, the insurer should be allowed for the difference arising from deterioration. *Id.*

32. **MARRIED WOMAN CANNOT RECOVER ON POLICY OF INSURANCE ON HER HUSBAND'S LIFE, FORFEITED BY NON-PAYMENT OF PREMIUM, WHEN.** — A married woman cannot claim the benefit of a policy of insurance on the life of her husband, issued for her benefit, but without her knowledge, without at the same time assuming all the responsibility of a failure to perform its essential conditions. And if her husband, after taking out such a policy, which it is stipulated shall become void in case of failure to pay any premium when the same shall become due, upon receiving notice that a premium will become due at a certain time, and before making payment thereof forges her name to a surrender of the policy, which the company in good faith accepts, paying the surrender value by a check made payable to the joint order of the husband and wife, and no payments of premium are thereafter made, she cannot recover on the policy after her husband's death, although the surrender is void and she knew nothing either of the issuance or surrender of the policy until after his death. *Schneider v. United States L. Ins. Co.*, 727.
33. **THERE IS NO DISTINCTION BETWEEN MUTUAL INSURANCE COMPANIES and mutual benefit societies, except where a statute has created a difference.** *Block v. Valley Mut. Ins. Ass'n*, 166.
34. **RIGHTS OF INSURED, or of persons claiming insurance in either a mutual insurance company or a mutual benefit society, arise out of and depend upon the contract between the parties, and must be ascertained and fixed by that contract, regardless of the character of the company; and the fact that the object of the latter in entering into the contract may be benevolent can import no new meaning to the unambiguous terms of the contract.** *Id.*
35. **MUTUAL BENEFIT SOCIETY. — RIGHT OF MEMBER** of mutual benefit society to change the beneficiary named in his certificate arises, not from the character of the association, but from the contract between the parties. *Id.*
36. **MUTUAL BENEFIT SOCIETY — CHANGE OF BENEFICIARY — ASSIGNMENT OF INTEREST IN BENEFIT FUND.** — Where the contract of insurance between a mutual benefit society and its member, as shown by his certificate of membership and the charter and by-laws of the association, reserves no right in him to substitute another beneficiary for the one originally named in his certificate, but provides that the policy may be assigned, the right of the designated beneficiary becomes vested, and he may assign his interest in the policy, while the member cannot substitute another beneficiary so as to divest the rights of the one first named. *Id.*
37. **CHANGE OF BENEFICIARY.** — Where the laws of a mutual benefit society provide that a member may, after naming a beneficiary, surrender his certificate and procure a new one naming another person as beneficiary, such member does not, by naming a beneficiary and transferring the possession of the certificate to him, thereby convey

to him any vested right or interest in the benefit during the member's life; but the latter may, although he regains possession of the certificate by false and fraudulent representations, surrender it to the society, and procure a new one naming another beneficiary, to the absolute exclusion of the beneficiary first named. *Brown v. Grand Lodge*, 420.

38. **POLICY OF LIFE INSURANCE, CHANGE OF BENEFICIARY NAMED IN.**—Where the constitution and by-laws of a beneficial organization provide that a member in good standing may, upon compliance with the rules and regulations of the organization, at any time change the beneficiary named in the certificate issued by it to him, if such member surrenders to his lodge his benefit certificate, with a written request that a new certificate be issued with a different beneficiary named therein, the change of beneficiary is thereby consummated, although the member dies before the old certificate is actually canceled and a new one issued by the supreme lodge, such lodge having no discretion to refuse to issue a new certificate in accordance with the direction of such member, upon receipt of the old one. And the subsequent issue of a new certificate will be regarded as relating back to the time of the legal surrender of the old one. An acceptance of the new certificate will also be presumed as of the same time, no acceptance thereof being required by the rules and by-laws of the organization. *Luhrs v. Luhrs*, 754.
39. **ACCIDENT INSURANCE POLICY, CONSTRUCTION OF PHRASE "DIED FROM DISEASE" IN.**—An accident insurance policy provided that it should not extend "to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, . . . nor to any case except where the injury is the proximate or sole cause of the disability or death." In an action on the policy it appeared that the insured died from a malignant pustule. And plaintiff's witness testified that this pustule is caused by contact with putrid or diseased animal matter; that it is an acute, infectious malady, sometimes epidemic, differing from diphtheria, small-pox, or scarlet fever, in the single fact that it has one particular germ from which it originates, namely, a particular form of bacteria transmissible to mankind; that it is "a pathological condition of the body." It was held that the insured died from disease within the meaning of the policy, and that the plaintiff could not, therefore, recover. *Bacon v. United States M. Acc. Ass'n*, 748.
40. **ACCIDENT INSURANCE—LOSS OF FEET, WHAT IS.**—One being shot in the back, whereby his spine was penetrated, total paralysis of the lower part of his body produced, and the use of both feet destroyed, is entitled to recover under a policy of insurance agreeing to pay him a specified sum if, from a violent and accidental injury, externally visible, he suffers the loss of two entire hands or two entire feet, or one entire hand or foot. It is not necessary, to sustain a recovery, that he should prove that he suffered the severance from his body of his legs or feet. It is sufficient that he has lost their use as members of his body, so that they will perform no function whatever. *Sheanon v. Pacific Mut. L. Ins. Co.*, 151.

INTERPRETER.

See MASTER AND SERVANT, 16.

INTEREST.

See MECHANIC'S LIEN, 4; NEGOTIABLE INSTRUMENTS, 1; USURY.

IRRIGATION.

HOMESTEAD; WATERCOURSES, 6, 7.

ISLANDS.

See WATERCOURSES, 14, 15.

JEWELRY.

See CARRIERS, 18, 19.

JOINT JUDGMENT.

See JUDGMENTS AND DECREES, 9.

JOINT LIABILITY.

1. JOINT TORT-FEASORS, ACTIONS AGAINST. — If two or more persons jointly commit an actionable tort, the injured party may join them in one action, or he may have a separate action against each, though he can have but one satisfaction. Nothing short of the satisfaction of a judgment against one, or his release, will operate to prevent a recovery by the same plaintiff against another joint trespasser in an action founded on the same tort. *State v. Boyce*, 458.
2. JOINT WRONG-DOERS, SEPARATE ACTIONS AGAINST. — STATUTE AUTHORIZING ACTION TO BE BROUGHT FOR the use of a wife, husband, parent, and child of a person whose death has been caused by negligence, and declaring that no more than one action shall lie for and in respect of the same subject-matter of complaint, does not prevent the maintenance of several distinct actions against several different persons, whose joint negligence caused the death for which recovery is sought. *Id.*

See NEGOTIABLE INSTRUMENTS, 2; TRESPASS.

JOINT-STOCK COMPANY.

See ASSOCIATIONS, 2.

JOINT TORT-FEASORS.

See JOINT LIABILITY.

JUDGES.

1. DISQUALIFIED JUDGE — PRESUMPTION IN FAVOR. — It will be presumed that a judge complied with the statute requiring him not to sit in the determination of any cause or proceeding in which he is interested. This presumption prevails, although it is shown that he was present at the opening of court each day. *Price v. Springfield R. E. Ass'n*, 595.
2. DISQUALIFICATION OF JUDGE — RELATIONSHIP. — A justice of the peace, whose wife is a cousin of the wife of a party to the action, is not disqualified to sit therein on the ground of relationship. The justice and the party in such case are not related by affinity. *Blalock v. Waldrup*, 350.

JUDGMENTS AND DECREES.

1. RIGHT OF APPEAL is limited in general to final judgments, and does not extend to interlocutory orders, and a judgment in equity is understood ordinarily to be interlocutory when inquiry as to a matter of law or fact is

directed preparatory to a final adjudication of the rights of the parties. *Davie v. Davie*, 170.

2. **RIGHT OF APPEAL.** — Where a decree decides the rights to the property in contest, and directs it to be delivered up, or to be sold, and the complainant is entitled to have it carried into immediate execution, the decree is final to that extent, and therefore appealable, although a further decree may be necessary to adjust the account between the parties. *Id.*
3. **APPEAL FROM A JUDGMENT IS ALLOWED**, where it finally determines a distinct and severable branch of the case, although the suit is not ended. *Id.*
4. **RIGHT OF APPEAL.** — A decree which is in form a final order adjudicating the parties' proportionate interests in the land in controversy, retaining the cause with reference to a master, who is directed to report at a subsequent term, and the court has yet to determine, upon the coming in of the report, what amounts shall be charged as liens upon the several interests, and whether there shall be a sale to satisfy the same, must be regarded as an interlocutory order from which an appeal will not lie. *Id.*
5. **WHEN VOID.** — If the defendant neither appears nor is served with process, the judgment against him is void. *Hobby v. Bunch*, 301.
6. **JUDGMENT RECITING SERVICE OF PROCESS**, but not stating the mode of service, when there is a return upon such process, must be considered as referring to such return, and if the service there shown is insufficient, the judgment is void. Hence, though a judgment declares that a defendant has been served with a copy of a rule, and the sheriff's return shows service of the rule upon the defendant by leaving a copy thereof at her residence, no other service will be presumed than that stated in the return; and that being insufficient, the judgment will be held void. *Id.*
7. **WANT OF JURISDICTION.** — **AN ACTION ON A JUDGMENT** may be defeated by showing, under proper averments, by way of cross-complaint, and in opposition to the recitals of the record, that process was not served on the defendant, and that he did not appear in the action. *Wilson v. Hawthorne*, 290.
8. **RELIEF FROM, IN EQUITY.** — To entitle a party to relief in equity from a judgment entered against him without jurisdiction over his person, he should allege that he had a good defense to the action on the merits. This allegation is regarded as a guaranty of his good faith, but it is not traversable, because defendant, as a result of a judgment so obtained, is not compelled to assume the burden of proof by affirmatively establishing, by a preponderance of evidence, the non-existence of the facts necessary to support plaintiff's recovery. *Id.*
9. **JOINT JUDGMENT, RELIEF FROM — PLEADING.** — Where two defendants are sued upon a joint judgment against them, and jointly plead, by way of cross-complaint, that one of them was not served with process, and did not appear in the action, such pleading is sufficient as to the defendant alleged not to have been served, whether it shows a sufficient defense for the other or not. *Id.*
10. **RELIEF AGAINST JUDGMENT RENDERED UPON UNAUTHORIZED APPEARANCE OF ATTORNEY, HOW TO BE SOUGHT.** — In the absence of special circumstances necessitating a resort to a court of equity, relief from a judgment rendered against a party, upon the unauthorized appearance of an attorney in his name, is to be sought in a direct application to the court by motion

in the action in which the unauthorized appearance was entered. Where, therefore, it appears without dispute from the moving papers that the moving party was neither served with process in the action, nor authorized the attorney who entered an appearance in his name to appear for him, nor had any notice of the action until after the rendition of the judgment, it is error to deny the motion and remit the moving party to his remedy by action. *Vilas v. Plattsburgh etc. R. R. Co.*, 771.

11. **JUDGMENT RENDERED UPON UNAUTHORIZED APPEARANCE OF ATTORNEY VACATED ABSOLUTELY WHEN.** — A judgment rendered upon an unauthorized appearance of an attorney will be absolutely vacated and set aside, where the attorney is insolvent at the time the application for relief is made, although he may not have been insolvent when the judgment was rendered, provided the application is made before the rights of the party procuring the judgment have changed to his prejudice. And where the judgment against which relief is sought was rendered against the moving party and other co-defendants, and the latter appealed therefrom and had it reversed, this judgment of reversal, though not an estoppel of record, because he was not a party to the appeal, nevertheless furnishes a strong reason for vacating the judgment absolutely, and for granting him final relief upon the motion. *Id.*
12. **DOCTRINE OF DENTON v. NOYES NOT APPLICABLE WHERE DEFENDANT IN JUDGMENT WAS NON-RESIDENT AND WITHOUT JURISDICTION.** — The rule that, in the case of a strictly domestic judgment, a party not served, but for whom an unauthorized appearance was entered by an attorney, cannot, on those grounds, assail the judgment for want of jurisdiction, is inapplicable in a case where the defendant in the judgment was a non-resident of the state during the pendency of the proceedings and was not within the jurisdiction. *Id.*
13. **LACHES, DEFENDANT IN JUDGMENT UPON UNAUTHORIZED APPEARANCE OF ATTORNEY, NOT GUILTY OF, WHEN.** — The judgment against which relief was sought was entered in 1880. The plaintiff soon after learned that the defendant, the moving party, had not been served, and that the attorney's appearance was unauthorized, and in 1881 he brought an action in Massachusetts, where the defendant resided, on the judgment, to which the defendant answered that the court which rendered the judgment never had jurisdiction. About two years after, a nonsuit was granted in the Massachusetts action, on the plaintiff's application. In 1887, the judgment was reversed as to other co-defendants, who had appealed, and thereafter the plaintiff assigned to a party that had full notice of defendant's equities. The motion to vacate was made in 1888, and it did not appear that the delay in making it had changed the situation of either the plaintiff or his assignee. A denial of the motion, on the ground of laches, was held to be erroneous, and that the plea of laches ought not to be listened to to uphold a judgment which on the appeal of the co-defendants, standing in the same position, had been held to have no legal foundation. *Id.*
14. **JUDGMENT IS CONCLUSIVE ON ALL DEFENSES** which could have been presented by the exercise of due diligence. Therefore a judgment cannot be collaterally avoided by showing that it was based on a note which might have been resisted by proving that it was given in consideration of an illegal sale of fertilizers. *Hobby v. Bunch*, 301.
15. **RES JUDICATA — WAIVER OF EXEMPTION.** — Where certain property is adjudged exempt from execution, and released, and other prop-

erty, also exempt, is subsequently seized in another suit between the same parties for the payment of the same debt, a waiver of exemption may be set up to subject the latter property to the payment of the debt, although such waiver might have been and was not set up nor litigated in the first suit. *Sloan v. Price*, 354.

16. PROBATE COURT, JUDGMENT OF, CANNOT BE COLLATERALLY ATTACKED. — The probate court of Arkansas is a court of superior jurisdiction; all presumptions are in favor of its action; and all irregularities in the exercise of its jurisdiction, rightfully acquired, are cured by final judgment, and that is not open to collateral attack. *Apel v. Kelsey*, 183.
17. JUDGMENT OF PROBATE COURT, PRESUMPTION IN FAVOR OF. — The orders and judgments of the probate courts of Missouri are entitled to the same favorable presumptions as to jurisdiction as are those of the circuit courts, or other courts of general jurisdiction. The judgments and orders of the former are not open to collateral attack. *Price v. Springfield R. E. Ass'n*, 595.
18. JUSTICES' JUDGMENTS — JURISDICTION — SERVICE OF PROCESS. — Where a justice's docket shows that the summons was served by a private person, but does not state that any inquiry was made by the justice as to the competency of the person designated to serve it, nor does any indorsement authorizing such service appear thereon, the justice acquired no jurisdiction, and his judgment is null and void, nor can he be subsequently permitted to supply these omissions by his oral testimony, and to make the necessary indorsement upon the docket, so as to validate the judgment. *King v. Bates*, 518.
19. JUSTICES' JUDGMENTS — EVIDENCE OF JURISDICTION. — Justices' courts are courts of limited jurisdiction, and when a case has been tried therein and the record thereof entered upon the docket, the justice's control over it has ended, except to issue execution; and he cannot thereafter show necessary jurisdictional facts by his oral testimony, even under order of a superior court. *Id.*
20. PRESUMPTION OF PAYMENT FROM LAPSE OF TIME. — A judgment upon which execution has not issued, and which there has been no attempt made to enforce for twenty years, is presumed to have been paid, and such presumption can be rebutted only by some positive act of unequivocal recognition, like part payment, or a written admission, or at least a clear and well-defined promise or admission, intelligently made, within the period of twenty years. *Beekman v. Hamlin*, 827.
21. JUDGMENT OF SISTER STATE, ACTION ON. — In an action on a foreign judgment, an answer which does not allege want of jurisdiction of the person or subject-matter of the controversy, but alleges simply that the judgment was rendered without jurisdiction, because rendered upon a complaint which, upon its face, disclosed no cause of action, is insufficient, and subject to demurrer. *Williams v. Renwick*, 158.

See CRIMINAL LAW, 3; EXECUTIONS, 8; JOINT LIABILITY; LIENS; MORTGAGES, 1; SCIRE FACIAS, 2.

JUDICIAL NOTICE.

See EVIDENCE, 7.

JUDICIAL PROCEEDINGS.

See HOLIDAYS.

JUDICIAL SALES.

1. **RESALE OF PROPERTY** will not be ordered upon an offer of increase of price alone, when the property has not been sold at a sacrifice. Special circumstances, appealing to equitable considerations, must always exist, where the sale is not void, to justify an order for a resale. *Page v. Kress*, 504.
2. **RESALE, WHEN ORDERED.** — A resale of property will be ordered only when an interested party is not barred by laches, and there has been fraud and misconduct in the purchaser, or others connected with the sale, surprise or misapprehension, not attributable to the party's fault, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer conducting it. *Id.*
3. **RESALE, WHEN ORDERED.** — Where property is sold under judicial decree to the highest bidder, and the sale is fairly conducted, without fraud, after proper notice, it will require a strong case and a peculiar exigency to warrant a court in setting it aside and ordering a resale. *Id.*

See **EXECUTIONS; EXECUTORS AND ADMINISTRATORS**, 6-12.

JURISDICTION.

1. **COURTS OF COMMON-LAW AND EQUITY JURISDICTION** are not necessarily limited to the provisions of the state statute in matters of jurisdiction, and may render such decrees in equity cases as the nature of the case requires. *Earle v. Earle*, 667.
2. **JURISDICTION, CONFLICT OF.** — Where goods have been lawfully seized under attachment in a court of law, a chancery court, having no supervisory or appellate jurisdiction, has no power to order the goods delivered into the custody of a receiver appointed by it. *Ford v. Judsonia M. Co.*, 192.
3. **JURISDICTION, CONFLICT OF.** — The custody and control of goods lawfully seized under attachment, by order of a court in the exercise of its jurisdiction, cannot be interfered with, except by a court of supervisory or appellate jurisdiction. *Id.*
4. **PROOF OF SERVICE OF PROCESS** to give jurisdiction cannot rest in parol. *King v. Bates*, 518.

See **COUNTIES; INFANTS**, 2; **JUDGMENTS AND DECREES**, 12, 16-19, 21; **MORTGAGES**, 5.

JUSTICE OF THE PEACE.

1. **APPEAL FROM JUSTICE'S JUDGMENT WAIVES ALL ERRORS** and defects in the original summons and the service thereof. *Witting v. St. Louis etc. R'y Co.*, 636.
2. **COMPLAINT IN JUSTICE'S COURT** which not only advises defendant of the nature of plaintiff's claim, but is of such nature that a judgment upon it will bar another action for the same demand, is sufficient. *Id.*

See **JUDGES**, 2; **JUDGMENTS AND DECREES**, 18, 19.

JURY AND JURORS.

See **NEW TRIAL**, 1; **TRIAL**, 3.

KLEPTOMANIA.

See **MARRIAGE AND DIVORCE**, 4.

LACHES.

See JUDGMENTS AND DECREES, 13; JUDICIAL SALES, 2; PAYMENT, 2; VENDOR AND VENDEE, 9.

LANDLORD AND TENANT.

1. **WATER-FIXTURES, TENANT OF UPPER FLOOR RESPONSIBLE TO TENANT BELOW FOR PROPER USE AND CARE OF.** — The lessee of an upper floor of a building is responsible for the proper use and proper care of the water and water-fixtures thereon, and is liable for damages sustained by the tenant of a lower floor by reason of his failure to exercise proper care in the use of such fixtures. *Rosenfield v. Arrol*, 584.
2. **REPAIR OF PREMISES.** — A landlord is not bound to keep the leased premises in repair, nor is he responsible to the tenant for injuries resulting to the latter from the non-repair of the leased premises. He is liable only for acts of misfeasance, and not of non-feasance. *Ward v. Fagin*, 650.
3. **REPAIR OF PREMISES — IMPUTATION OF NEGLIGENCE TO LANDLORD.** — In the absence of express covenant, the landlord is not bound to keep the leased premises in repair, nor can the negligence of a third party in this respect be imputed to him, whether the lessee is tenant of the whole or only a portion of the leased premises. *Id.*
4. **LANDLORD'S LIABILITY FOR NEGLIGENCE OF THIRD PERSON.** — Where the landlord is not bound to keep the leased premises in repair, any injury to them, and through them to the tenant, caused by the negligent act of third persons, cannot create or cast on the landlord a liability which, prior to such act, did not exist. *Id.*
5. **CANCELLATION OF LEASE TO PREVENT WASTE.** — A court of equity will interfere on behalf of a landlord and prevent the decay and eventual ruin and destruction of his orchard, by canceling a lease and arresting the progress of waste resulting from the failure and omission of the tenant to perform his obligations under the lease. *Anderson v. Hammon*, 832.
6. **POSSESSION OF PROPERTY AS NOTICE OF TITLE.** — Possession of property by a tenant is notice of title in every form; but when the person having possession has placed on record a particular title consistent with that possession, the registry of it will restrict the generality of notice from possession, and narrow it to specific notice of that particular title. Where, therefore, land paid for by a wife's money is conveyed by mistake to her husband, and after the entry of judgments against him the husband and wife convey to a third person, who then conveys to the wife, and the sheriff sells the land as the property of the husband, the wife giving notice to the bidders that the land was her sole and separate property, and that the sale would not pass title, such notice, being silent as to the fact that her title antedated the judgments, and that notice and the possession by her tenants being consistent with and referable to the recorded deed to her, is not sufficient notice to put the purchaser on inquiry as to the prior equitable title; nor is the possession sufficient for that purpose. *Lance v. Gorman*, 914.

See INJUNCTIONS, 1.

LAPSE OF TIME.

See JUDGMENTS AND DECREES, 20.

LARCENY.

See CRIMINAL LAW, 5, 26, 27.

LEASE.

See LANDLORD AND TENANT.

LEGAL HOLIDAYS.

See HOLIDAYS.

LETTER-CARRIERS.

See NEGLIGENCE, 1.

LEVY.

See EXECUTIONS.

LIBEL.

1. A BOOK CONTAINING A LIST OF DELINQUENT DEBTORS IS LIBELOUS, and not privileged, if it is published by an association for distribution among its members or subscribers, and its manifest purpose is to coerce payment of claims, the name of each delinquent being dropped from the list and the fact of his having made payment announced as soon as it occurred. *Muetze v. Tuteur*, 115.
2. SENDING A LETTER THROUGH THE MAILS IN AN ENVELOPE ON WHICH WERE PRINTED the name of an association and the statement that it was an organization for the collection of bad debts is the publication of a libel, because those words imply that the person addressed is a bad character, and ought not to be credited, and that the correspondence inclosed is for the purpose of collecting from him a bad debt. *Id.*
3. WHO GUILTY OF. — One who furnished the name of his debtor to be published in a list of bad debtors intended for circulation among the members of the association, where the obvious object of the publication of such list was to coerce payment of debts, is guilty of libel, where it appears that the list had been furnished a member of the association who refused to credit plaintiff, and assigned as his reason therefor the appearance of plaintiff's name in such list, though it was not proved that such member had ever trusted plaintiff or would have trusted him but for the list. *Id.*
4. PUBLICATION LIBELOUS PER SE WHEN. — To publish in a newspaper an article stating that plaintiff was threatened with a breach of promise suit, that he and his friends were moving to effect a reconciliation, but that the young lady insisted on his marrying her, is libelous *per se*, because the tendency of the publication was to disgrace him and bring him into ridicule and contempt. And in an action of libel for such publication the plaintiff may recover without alleging or proving special damages. *Morey v. Morning J. Ass'n*, 730.
5. DEFENSE IN LIBEL, WHAT IS NOT. — Where a newspaper proprietor publishes a libel without any inquiry and without any knowledge on the subject, it is no defense for him to show that the article was telegraphed to him by a correspondent who had heard the matter stated in the article; his correspondent is not his agent in the sense that the correspondent's information was his information. *Id.*

6. **EVIDENCE IN ACTION FOR LIBEL TO PROVE GENERAL DAMAGE, WHAT ADMISSIBLE.** — In an action for libel for publishing an article in a newspaper, to the effect that plaintiff was threatened with a breach of promise suit, evidence of the nature of the plaintiff's business, and that he was a married man, is competent to show the circumstances surrounding him, and as bearing upon the hurtful tendency of the libel, and the general damage to which he was exposed. *Id.*
7. **EVIDENCE.** — In an action for libel upon plaintiff by causing his name to be published in a book purporting to contain a list of bad debtors, he may show that he was denied credit by a subscriber to the book, who, on being asked why he would not credit plaintiff, showed this book, and gave as his reason for denying plaintiff credit that his name was therein. *Muetze v. Tuteur*, 115.
8. **EVIDENCE IN MITIGATION.** — In an action of libel, in representing plaintiff unworthy of credit, the defendant cannot be permitted to prove how many persons plaintiff owed. The evidence which can be received in mitigation must relate, not to specific acts, but to general character and reputation. *Id.*
9. **EVIDENCE OF FACT OF WHICH DEFENDANT HAD NO KNOWLEDGE NOT AVAILABLE IN MITIGATION OF DAMAGES WHEN.** — In an action for libel, the defendant is not entitled to the benefit of evidence of a fact of which he had no knowledge at the time of the publication of the libel, in mitigation of damages. *Morey v. Morning J. Ass'n*, 730.

LIBERTY OF THE PRESS.

See CONTEMPT, 1, 2.

LIENS.

ORDER OF PAYMENT. — Where plaintiff has a prior mortgage lien on two parcels of land, while defendant has a second judgment lien on one of the parcels only, the land which is subject to the mortgage lien alone should be first sold, and the proceeds applied on the mortgage, and the land which is subject to both liens should then be sold, and the proceeds applied to pay anything remaining due on the mortgage, and the remainder should be applied to the payment of the judgment lien, and if anything then remains, it should be deposited in court for whoever may be entitled thereto. *Hall v. Stevenson*, 803.

See CORPORATIONS, 11; MORTGAGES, 1; SHERIFF'S DEED, 3; REPLEVIN, 1.

LIFE INSURANCE.

See INSURANCE, 32.

LIMITATIONS OF ACTIONS.

See APPEAL AND ERROR, 2; EXECUTORS AND ADMINISTRATORS, 3; MORTGAGES, 3; NUISANCES, 5, 6; WATERCOURSES, 3-5, 8-10.

LIS PENDENS.

See ABATEMENT, 1, 2.

LOSS OF HUSBAND'S SOCIETY.

See HUSBAND AND WIFE, 1.

LOT-OWNERS.

See MUNICIPAL CORPORATIONS.

LUGGAGE.

See CARRIERS, 18, 19.

MAIL.

See LIBEL, 2.

MANDAMUS.

See COUNTIES; SCHOOLS, 1, 2.

MARRIAGE AND DIVORCE.

1. **MARRIAGE UNDER DURESS.** — A man arrested on probable cause, and without malice, for seduction, who marries the woman to procure his discharge, cannot have the marriage avoided on the ground of duress, upon discovering that he could not have been convicted of the seduction. *Marvin v. Marvin*, 191.
2. **PRESUMPTION OF MARRIAGE FROM COHABITATION AND REPUTE WILL NOT BE INDULGED** when the question is, which of two legal marriages is valid, and the second is proven by direct evidence, and the first is sought to be established only by evidence of cohabitation and repute. The law, in opposition to a marriage actually proved, will not indulge the presumption that one of the contracting parties was already married; but the jury may consider such cohabitation and repute, in connection with other evidence tending to establish the first marriage. *Jenkins v. Jenkins*, 316.
3. **CIRCUMSTANTIAL AS WELL AS DIRECT EVIDENCE MAY BE CONSIDERED BY A JURY IN SUPPORT OF AN ALLEGED marriage**, although one of the parties to such marriage is shown, by direct and undisputed evidence, to have contracted a subsequent marriage while the first, if valid, remained undissolved. *Id.*
4. **KLEPTOMANIA IS NOT GROUND FOR ANNULMENT OF MARRIAGE**, where the party afflicted by it is otherwise sane, and his or her mind is not so affected by this peculiar propensity as to be incapable of understanding or assenting to the marriage contract. A marriage contract will not be decreed void on the ground of the insanity of one of the parties unless there was, at the time of the marriage, such a want of understanding in such party as to render him or her incapable of assenting to the contract. *Lewis v. Lewis*, 559.
5. **CONCEALMENT OF DEFECTS OF CHARACTER NOT GENERALLY GROUND FOR AVOIDING MARRIAGE.** — Although a contract of marriage may be avoided when brought about by artifice and fraudulent practices, concealment or deception by one of the parties, in respect to traits or defects of character, habits, temper, reputation, bodily health, and the like, is not, generally speaking, sufficient ground for avoiding a marriage. *Id.*
6. **DIVORCE — DESERTION NOT JUSTIFIED BY LACK OF AFFECTION.** — **DIVORCE FOR WILLFUL DESERTION** by the wife cannot be denied on the ground of lack of affection on the part of the husband for the wife. *Taylor v. Taylor*, 394.

MARRIED WOMEN.

See HUSBAND AND WIFE; INSURANCE, 32; SCIRE FACIAS, 2; TRUSTS, 4, 5.

MASTER AND SERVANT.

1. **MASTER'S DUTY TO PROVIDE FOR HIS SERVANT REASONABLY SAFE PLACE TO WORK IN.** — A master owes to his servant the duty of providing for him a place reasonably safe for the work which he is directed to do, and when this duty is performed by the master through other servants, they are regarded as performing the master's duty, and the servant has the right to assume that the place has been made reasonably safe. Where, therefore, in an action to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence, the evidence shows that the intestate being ordered to clean out certain underground water-pipes, a trench was opened to furnish a proper place for doing the work, by the defendant's section-man and laborers under its direction, and the earth caved in upon and suffocated the intestate, the question of defendant's negligence should be submitted to the jury, and it is error to grant a nonsuit. *Kranz v. Long Island R'y Co.*, 716.
2. **DANGEROUS PLACE FOR WORK.** — A master who fails to furnish a reasonably safe place in which the employee is to do his work is guilty of negligence, and if an injury occurs to the employee by reason of such negligence, without contributory negligence on his part, the master is responsible for damages sustained therefrom. *Nadau v. White River L. Co.*, 29.
3. **DANGEROUS PLACE FOR WORK.** — A master is guilty of negligence in not furnishing a reasonably safe place for his employee to do his work, when the latter is unacquainted with the working of the master's mill, and of machinery in general, and is put to work, without being cautioned of danger, in a very narrow alley, on the side of which, and behind him, where he is doing his work, and at a point where it is necessary for him to pass, is a set of heavy cog-wheels, revolving inward, about eighteen inches above the floor, wholly uncovered on the side next the alley, and covered on top and thus partly obscured from the sight of the employee, and yet revolving so near the alley that his clothes, when he is passing by the cogs, can be readily seized by the revolving wheels, and his limbs drawn into and crushed by them. *Id.*
4. **TEST OF NEGLIGENCE IN MASTER IN FURNISHING APPLIANCES FOR SERVANT.** — From the fact that a particular method or appliance employed by a master is dangerous, it does not follow that it is negligence for him to use it. Some employments are essentially hazardous, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. *Titus v. Bradford etc. R. R. Co.*, 944.
5. **DUTY OF MASTER IN FURNISHING APPLIANCES FOR SERVANT.** — A master is not bound to use the newest and best appliances for his servant, but he performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, "reasonably safe" means safe according to the usages, habits, and ordinary risks of the business. *Id.*
6. **PRESUMPTION EXISTS IN FAVOR OF MASTER THAT HE DISCHARGED HIS DUTY** to the servant by providing suitable instrumentalities for the business, and in keeping them in proper repair, and if they are shown to have become defective, that the master did not have notice of such

defect, and this presumption continues, notwithstanding an accident has happened and the servant has been injured in consequence of a defect in some tool or other instrumentality furnished him by his master. *Georgia R. R. etc. Co. v. Nelms*, 308.

7. **BURDEN OF PROOF.** — **THOUGH A SERVANT IS INJURED**, while in the service of his master, from the breaking of a tool furnished by the latter, no presumption of negligence arises against him; and the servant, before he can recover for such injury, must show that the tool was defective, and that the master knew it, or could have ascertained it by the exercise of ordinary care and diligence. The mere fact that the tool and other tools of the same description were defective, and that injury resulted therefrom, is not sufficient to authorize a jury to infer negligence on the part of the master in their purchase and selection. *Id.*
8. **MACHINERY, WHAT IS NOT.** — **A HAMMER** is a tool or instrument ordinarily used by one man in the performance of manual labor, and when disconnected from any other mechanical appliance, and operated singly by muscular strength directly applied, such tool or instrument is not machinery, within the meaning of the statute creating a presumption that a person injured by the machinery of a railway company was injured through the want of care and diligence of the company or its agents. *Id.*
9. **UNINSTRUCTED SERVANT ASSUMES ORDINARY RISKS OF HIS EMPLOYMENT.** — For two persons of competent strength to load an open flat-car with lumber of uniform length, breadth, and thickness, by piling the same in parallel tiers one after another, is to do work which common laborers can perform without more hazard to their own security than appertains to ordinary manual labor. It requires no special skill nor antecedent training, and therefore a youth seventeen years of age, who engages in it as part of the business for which he was employed by the railway company, is not unduly exposed by reason merely of being left uninstructed in the mode of doing the work and unwarned beforehand of any danger attending it. *Sims v. East etc. R. R. Co.*, 352.
10. **RISKS ASSUMED BY EMPLOYEE** are those reasonably incident to his employment, and no others, unless unusual and unreasonable risks are open and visible, and known to and comprehended by the employee. He then assumes all risks so known to him, whatever they may be. *Nadau v. White River L. Co.*, 29.
11. **ASSUMPTION OF RISK.** — **BURDEN OF PROOF** that an employee assumed an unusual risk attendant upon his employment is upon the employer, for the reason that the assumption of such risk is in the nature of contributory negligence on the part of the employee, which prevents his recovery. *Id.*
12. **THE PLAINTIFF HAVING BEEN INJURED BY SOME OF THE LUMBER FALLING UPON HIM**, and there being no evidence that the doing of such work properly was dangerous, or that he did not know how to do it properly, or that he was wanting in capacity to know, and nothing being alleged in the declaration as to any defect in the car or any of the appliances, the court was correct in granting a nonsuit. *Sims v. East etc. R. R. Co.*, 352.
13. **SERVANT CONTINUING IN EMPLOYMENT WITH KNOWLEDGE OF ITS RISKS CANNOT RECOVER.** — Where a servant accepts an employment with full knowledge of its risks, and continues therein after having had his attention specially called to the alleged source of the accident by which he

- is afterwards injured, no recovery can be had against the master for such injury. *Titus v. Bradford et. R. R. Co.*, 944.
14. **CONTRIBUTORY NEGLIGENCE, WHEN QUESTION OF FACT.** — When an inexperienced employee is put to work in a dangerous place, which is pointed out to him by the master from a place where the danger cannot be seen, and after working five days receives an injury,¹ but testifies that he did not know of the danger until the time of the accident, the question of his contributory negligence is for the jury to determine. *Nadau v. White River L. Co.*, 29.
 15. **NEGLIGENCE — EVIDENCE.** — In an action by an employee to recover damages for injuries received in a saw-mill, evidence, other than expert, is admissible to show that it is customary in other mills to cover dangerous machinery, as tending to show that defendant was negligent in not covering such machinery in his mill. *Id.*
 16. **EVIDENCE OF STATEMENTS MADE BY INTERPRETER TO EMPLOYEE.** — In an action by an employee to recover for injury sustained by coming in contact with dangerous machinery, after being employed by the master's foreman through an interpreter, evidence as to what the interpreter at that time told the employee, as to what the foreman then said about giving the employee a safe place, or that there was no danger, is admissible. *Id.*
 17. **SERVANT CANNOT IMPOSE ON HIS MASTER HIGHER LIABILITY THAN LATTER IS UNDER TO HIMSELF.** — A servant cannot by any act of his impose upon his master a higher liability for negligence than the master is under to the servant himself. A person; therefore, who assists a servant, at the latter's request only, can have no different remedy against the master from that which the servant himself has; and as a servant engaged in the service of a common master, and in a common employment, cannot recover against the master for injuries received through the negligence of a fellow-servant, so such person who joins in the service at the servant's request, and is so injured, cannot recover against the master, because he makes himself one of a class, who, as against their master, have no right of recovery for each other's negligence. Nor does it make any difference in such case that such person rendered the assistance in obedience to an order of his own superior, made in response to a call proceeding from the servant to whom such assistance was rendered. And the same rule applies where the work in doing which the injury is received is a joint movement, in which are interested both the master of the person injured, and the master of the servant at whose request the service is rendered. *Wischam v. Rickards*, 900.
 18. **VOLUNTEER NOT FELLOW-SERVANT.** — A person who voluntarily assumes to assist the servants of a railroad company, at their request, in moving a loaded car, without the knowledge or consent of the company, is merely a volunteer, and not a fellow-servant with them. *Rhodes v. Georgia R. R. et. Co.*, 362.
 19. **WHO ARE NOT FELLOW-SERVANTS.** — To constitute a servant, there must be some contract, or some act on the part of the master, which recognizes the person as a servant, either express or implied, and a person who assists the servant of another, either gratuitously or at the request of such servant, in an emergency, cannot recover from the master on account of the negligence or misconduct of such servant. *Id.*
 20. **FELLOW-SERVANTS — NEGLIGENCE OF FOREMAN.** — A foreman who has charge of his employer's freight and coal business and the unloading of

vessels, laden with coal, as well as the absolute power to employ, direct, and control the other men employed in the master's business, is not a fellow-servant with them, so as to relieve the master from liability for the negligence of the foreman in performing the duties within the scope of his employment. *Brown v. Gilchrist*, 496.

21. NEGLIGENCE OF FOREMAN IS NEGLIGENCE OF MASTER. — The foreman of the master is guilty of negligence, when he has knowledge of the inexperience of the employee, and fails to point out to him the dangers of his employment when he employs him, and the negligence of the foreman in this respect is the negligence of the master. *Nadau v. White River L. Co.*, 29.
22. RECOVERY OF WAGES. — A servant wrongfully discharged after rendering part of the services contracted for may, by waiting until the expiration of the term, bring his action for wages as though he had actually performed his contract, and is *prima facie* entitled to recover at the rate stipulated in the contract. The employer may reduce the recovery by so much as the servant did earn, or could by the use of ordinary diligence have earned, in other employment of like kind. The burden of proof to establish such reduction rests upon the employer. *Cox v. Bearden*, 359.

See ATTACHMENT AND GARNISHMENT, 6, 7; CORPORATIONS, 1-3; INNKEEPERS, 2; MUNICIPAL CORPORATIONS, 1; RAILROAD COMPANIES.

MAXIMS.

Dies dominicus non est juridicus. *Spalding v. Bernhard*, 75.
Omnia rite presumuntur. *Owen v. Baker*, 618.
Respondeat superior. *Caspary v. Portland*, 842.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANIC'S LIEN.

1. ELECTRIC APPARATUS SUBJECT TO. — Poles planted in the ground, connected together by means of wire and insulators, for the purpose of transmitting electricity for light and power and for other purposes, constitute a structure within the meaning of section 3669, Hill's Oregon Code, relating to mechanics' liens, and are subject to a lien for labor performed thereon. *Forbes v. Willamette F. E. Co.*, 793.
2. EVIDENCE TO ESTABLISH. — Time-checks given by a contractor to his laborer are not conclusive evidence of labor performed, against the owner of the subject of a mechanic's lien, but are declarations of the latter's agent in the line of his employment, and sufficient to establish the claim to such lien, in the absence of evidence to the contrary. *Id.*
3. ATTORNEY'S FEE. — Where the statute allows the court to tax an attorney's fee in favor of the claimant in case of the foreclosure of mechanics' liens, a fee of ten dollars for each claim foreclosed is not an unreasonable allowance. *Id.*
4. FORECLOSURE — INTEREST. — Upon the foreclosure of mechanics' liens, interest should be allowed on each claim from the date of filing the notice of lien. *Id.*

MEDICINES.

See APOTHECARIES.

MEMBERSHIP.

See ASSOCIATIONS.

MESSENGER-BOY.

See CORPORATIONS, 1, 3.

MINGLING MONEYS.

See AGENCY, 6.

MISAPPROPRIATION OF FUNDS.

See MUNICIPAL CORPORATIONS, 16-20.

MISJOINDER.

See PLEADING, 1.

MITIGATION.

See DAMAGES.

MORTGAGES.

1. **JUDGMENT LIEN, MORTGAGE FOR PURCHASE-MONEY SUPERIOR TO.** — Where the purchaser, at the time he receives an absolute conveyance, executes a mortgage on the land to a third person, who advances the purchase-money for him, which is paid directly to the vendor, and this is all done as part of the same transaction, the lien of the mortgage is superior to that of a prior judgment recovered against such purchaser. *Laidley v. Aikin*, 408.
2. **GROWING CROPS.** — The sale of land under a deed of trust carries with it the growing crops sown by the mortgagor. *Hayden v. Burkemper*, 643.
3. **EQUITABLE DISCHARGE OF OUTLAWED MORTGAGE.** — Equity will compel the discharge from the record of a mortgage against which the statute of limitations has run, without requiring proof of the actual payment of the debt. *Kingman v. Sinclair*, 522.
4. **MORTGAGE TO DEFRAUD CREDITORS — ACTION TO FORECLOSE MAY BE ENJOINED.** — A mortgagor may maintain an action to enjoin the foreclosure of a mortgage executed without consideration, notwithstanding it was given by him for the purpose of hindering and delaying his creditors. *Devlin v. Quigg*, 592.
5. **IN FORECLOSURE PROCEEDINGS, DUE SERVICE OF PROCESS IS NO LESS REQUIRED** to give a court jurisdiction of the person and subject-matter than in ordinary personal actions. *Hobby v. Bunch*, 301.
6. **RIGHT OF PURCHASER UNDER FORECLOSURE TO IMPROVEMENTS — FORM OF DECREE FOR REDEMPTION.** — A purchaser in good faith at a foreclosure sale, under the belief that he acquired a perfect title, is entitled, as against the redemptioner, to the full value of improvements made by him, though they may exceed those which a mortgagee in possession is ordinarily justified in making. The rule that a mortgagor cannot be improved out of his estate does not apply to such a case, and the decree permitting redemption may provide that, unless the redemption money is paid within a certain time, the mortgage shall stand foreclosed, without a further order that in case of default in payment the property shall be sold. *Martin v. Ratcliff*, 605.

7. **MORTGAGEE'S RIGHT TO COMPENSATION FOR IMPROVEMENTS, AND HIS LIABILITY FOR RENT.** — A mortgagee in possession of land is not entitled to compensation for improvements made upon the mortgaged premises, further than is necessary to keep them in repair. He is not entitled to pay for permanent improvements made without the mortgagor's consent, and is chargeable with only such rent as the land would have yielded without the improvements. *Robertson v. Read*, 188.

See **INSURANCE**, 18; **LIENS**; **PROCESS**, 2; **REPLEVIN**, 1.

MUNICIPAL CORPORATIONS.

1. **CONSTITUTIONALITY OF ORDINANCE AGAINST EMPLOYING CHINESE.** — A city ordinance making it a misdemeanor for any contractor employed under contract with the city to employ any person to work more than eight hours a day, or to employ Chinese labor under such contract, is an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, a direct infringement of the right of such persons to make and enforce their contracts, and unconstitutional and void so far as it attempts to create a crime. *Ex parte Kuback*, 226.
2. **MUNICIPAL LEGISLATURE HAS POWER TO DETERMINE EXTENT TO WHICH SIDEWALKS MAY BE OBSTRUCTED.** — The municipal authorities of a city or borough may determine the extent to which sidewalks and pavements may be obstructed by cellar doors, door-steps, awnings, projecting windows, cornices, and the like. This power must be exercised by regulations that are general and uniform, that are reasonable and certain, and that are in conformity with the constitution; and when so exercised, it is binding on all the inhabitants of the municipality. *Livingston v. Wolf*, 936.
3. **BOROUGH ORDINANCE AUTHORIZING PROJECTION OF BAY-WINDOW ON STREET NOT UNREASONABLE WHEN.** — A borough ordinance which prohibits the construction of any bay-window projecting into a street sixty feet wide more than twenty-eight inches, by clear and necessary implication permits the erection of a bay-window within that limit, and is not unreasonable; and under it a bay-window projecting into the street less than twenty-eight inches will not be enjoined. *Id.*
4. **MUNICIPAL CORPORATIONS — RIGHT OF CITY TO CHANGE COURSE OF SURFACE WATER.** — A city, while properly improving its streets, has a right to interfere with the natural flow of surface water, and is not liable to an owner of land situated within its limits for not permitting such water, which has been accustomed to flow over the land, to be turned down the gutters of the street, but may carry the water by means of a box-sewer through such land to a natural creek at or near the place where it had formerly flowed. *Bush v. Portland*, 789.
5. **MUNICIPAL CORPORATIONS — IMPROVEMENT OF STREETS.** — A city, while properly improving its streets, is not liable to an owner of land indirectly injured thereby, when such injury is the necessary result of such improvement. *Id.*
6. **LOT-OWNERS IN CITY NOT BOUND TO REPAIR STREETS OR SIDEWALKS AT COMMON LAW.** — No obligation to repair streets or sidewalks adjoining lots in a city rests upon the owners of such lots, at common law, but the duty to do so, if any, arises out of statutory obligations imposed upon them by the state or municipality. Such owners do not, therefore, incur

any liability to individuals or municipalities for damages arising from streets rendered defective through want of repairs, where the charters of such municipalities do not assume to make the lot-owners liable to the party injured. *Rochester v. Campbell*, 760.

7. **REMEDY FOR VIOLATION OF DUTY IMPOSED BY STATUTE IS EXCLUSIVE WHEN.** — Where a new right is created or a new duty is imposed by statute, if a remedy be given by the same statute for its violation or non-performance, the remedy given is exclusive. Where, therefore, a city charter makes it the duty of the owner of every lot in the city to keep the sidewalks adjoining it in good repair, and empowers the superintendent of streets, in case of the owner's neglect, after notice to make repairs, to make them himself, and collect the expense thereof from the owner, the city cannot, in the absence of any negligence or breach of contract duty on the part of the owner, recover from him the amount of a judgment recovered against it for damages sustained by one who was injured in consequence of a defect in the sidewalk adjoining such owner's premises. *Id.*
8. **NEGLIGENCE IN REPAIR OF STREETS.** — If a city by its charter is charged with the duty to keep its streets in repair, and has ample means provided by taxation to discharge it, it is liable for neglect to perform such duty. *Maus v. Springfield*, 634.
9. **PROOF OF STREET.** — A certain locality within a city may be shown to be part of a public street by proof that it was in the actual possession of the city and opened to and used by the public as a thoroughfare. Formal dedication or appropriation of the street need not be shown. *Id.*
10. **IS BOUND TO EXERCISE ORDINARY CARE** to keep its streets in repair for the use of the public by night as well as by day. *Id.*
11. **NOTICE OF DEFECT IN STREET** on the part of a city may be inferred from a continuance thereof for three months; and a failure to repair such defect after notice, and a reasonable opportunity to do so, is evidence of negligence. *Id.*
12. **DEFECT IN STREET — CONTRIBUTORY NEGLIGENCE.** — Knowledge of a defect of long duration in a street, by a foot-traveler injured thereby, is not necessarily a bar to recovery, where the defect is not of such nature as to render the use of the street necessarily dangerous to a person ordinarily careful, nor can it be declared, as matter of law, that he failed to exercise ordinary care, where the facts do not exclude every other fair and reasonable inference. In such case the question of contributory negligence is for the jury. *Id.*
13. **LIABILITY FOR DEFECTIVE BUILDINGS.** — Where a city has constructed an engine-house so that its doors swing outwardly by means of a spring attachment, to make them open easily, and when open they extend half-way across the sidewalk, it is not guilty of negligence in maintaining a defective building, or in failing to maintain its sidewalks in a reasonably safe condition, so as to make it liable to a traveler on the sidewalk who is injured by the opening of the doors. *Kies v. Erie*, 867.
14. **LIABILITY FOR NEGLIGENT ACT OF OFFICER.** — A city is not liable for the negligent act of its fireman in so opening the door to an engine-house as to strike and injure a pedestrian on the sidewalk. *Id.*
15. **LIABILITY FOR WRONGFUL ACT OF OFFICER.** — In order to make a municipal corporation impliedly liable, on the maxim of *respondet superior*, for the wrongful acts or negligence of its officer, it must be shown that

- he was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer, and also that such wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which devolved upon him by law, or by the direction or authority of the corporation. *Cuspary v. Portland*, 842.
16. MISAPPROPRIATION OF FUNDS. — A town council has no power, under the law of Arkansas, to appropriate corporate money to aid in building a county court-house to be located in such town. *Russell v. Tate*, 193.
 17. OFFICERS OF CITY ARE TRUSTEES in managing and applying corporate funds; and their application of them to illegal purposes is a breach of trust, which may be enjoined in equity. *Id.*
 18. REMEDY FOR ILLEGAL APPLICATION OF FUNDS. — After suit brought against a city council to cancel an illegal appropriation of corporate money, and also to cancel the warrant for the payment thereof, as well as to recover the money, the jurisdiction of the court cannot be ousted by the act of the council in canceling the unpaid warrant. *Id.*
 19. REMEDY FOR MISAPPROPRIATION OF CORPORATE FUNDS. — Tax-payers may maintain suit in equity against towns and their officers to prevent the misapplication of the corporate funds, and the relief granted may be either injunctive or affirmative. *Id.*
 20. REMEDY FOR MISAPPLICATION OF CITY FUNDS. — Where a city council has abused its discretion in voting away the city funds, this amounts to a conversion of trust funds, for which each of its members, and also the mayor who ordered and the treasurer who made the payment, are liable. *Id.*
 21. LIABILITY FOR NUISANCE. — A city is liable in damages for maintaining a defectively constructed privy-well upon its property used for school purposes, and which creates a nuisance to the injury of adjoining owners. *Briegel v. Philadelphia*, 885.
 22. LIABILITY FOR NUISANCE. — A municipal corporation owning and occupying property for public purposes is as much subject as a private person to the rule that it must so use its own property as not to injure that of another, and is therefore liable to an adjoining owner for injuries from a nuisance maintained by it upon its property. *Id.*
 23. ORDINANCE DECLARING WHAT IS NUISANCE. — Neither the keeping, owning, or raising of bees within the limits of a city is, in itself, a nuisance, and an ordinance which declares it to be so, without regard to the fact whether it is so or not, is void. Whether or not such act constitutes a nuisance must be judicially determined in each case. *Arkadelphia v. Clark*, 154.

See CONTRACTS; HIGHWAYS, 3; NUISANCES, 4.

MUTUAL BENEFIT ASSOCIATIONS.

See INSURANCE, 33-38.

MUTUAL INSURANCE.

See INSURANCE, 33-38.

NEGATIVES.

See PHOTOGRAPHER.

NEGLIGENCE.

1. **RIGHT OF NEGLIGENT PERSON TO RECOVER FOR THE NEGLIGENCE OF ANOTHER.** — A LETTER-CARRIER who delivers to the clerk of a hotel a valuable registered letter directed to a guest at the hotel, but which is lost before it reaches the latter, may recover of the clerk, if compelled by the post-office department to pay the loss to the party to whom the letter was addressed. *Joslyn v. King*, 656.
2. **ONE INJURED by a train of cars while crossing the street, on account of the failure of the railroad company to ring the bell, to give proper danger signals, or to keep a watchman at the street crossing, as required by ordinance, is entitled to recover, if exercising proper care himself, whether his injury was occasioned by two or more of such negligent acts or one only of them.** *Murray v. Missouri P. R'y Co.*, 601.
3. **CONTRIBUTORY NEGLIGENCE.** — In actions for injuries caused by the alleged negligence of another, the injured party must be free from fault, to sustain his action. Hence, in such actions, it is error to refuse to charge that "if plaintiff's own negligence caused or contributed to the injury, he cannot recover," when there is evidence to support such charge. *Brown v. Gilchrist*, 496.
4. **PROXIMATE AND REMOTE CAUSE.** — The test by which the line is to be drawn between proximate and remote cause, in reference to liability for the consequences of negligence, is, whether or not the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the negligence. In the first instance, liability attaches; in the latter, it does not. *Haverly v. State Line etc. R. R. Co.*, 848.
5. **PROXIMATE CAUSE, WHEN QUESTION FOR JURY.** — Where a railroad company negligently sets a fire on its right of way, near the property of another, who makes unsuccessful attempts to extinguish it, and a wind arising the next day, the fire is communicated to and destroys his property, the question as to whether or not the original act of setting the fire was the proximate cause of the injury, notwithstanding the lapse of time and the wind, is for the jury, and not for the court, to determine. *Id.*
6. **WHEN QUESTION OF FACT.** — If one is injured by a train of cars while crossing the street, and alleges negligence on the part of the company in failing to ring the bell, and the evidence on this point is conflicting and equally divided, the question is one of fact to be determined by the jury. *Murray v. Missouri P. R'y Co.*, 601.
7. **CONTRIBUTORY NEGLIGENCE, WHEN QUESTION OF FACT.** — Where, in an action to recover for personal injuries, it is shown that plaintiff was passing along a well-lighted street, and being attracted by a brilliantly lighted show-window, he turned and approached it, and in doing so fell into an opening on the sidewalk, above the surface of which there was nothing to obstruct his approach or indicate danger, although the opening was plainly visible, it cannot be said, as matter of law, that he was guilty of contributory negligence; but this question should be submitted to the jury as one of fact, to be determined from the evidence in the case. In such case, all that is required of the pedestrian to avoid accidents is, that he act as a reasonably prudent and careful man would under the circumstances, and an instruction that he must look where he is walk-

ing, and avoid all obstacles which are dangerous and plainly visible, is erroneous. *Mathews v. Cedar Rapids*, 436.

8. CONTRIBUTORY NEGLIGENCE, WHEN QUESTION OF LAW OR FACT. — If, from the undisputed evidence, only one conclusion can reasonably be drawn, contributory negligence is a question of law. If, however, under the facts, different minds might reasonably reach different conclusions, it is a question of fact for the jury. *Id.*
9. CONTRIBUTORY NEGLIGENCE — SPREAD OF FIRE. — Where one has knowledge of the existence of a fire on the premises of another, which is likely to destroy his own property, he must use reasonable care and diligence to prevent it from spreading thereto, and whether he has done this or not is for the jury to determine. *Haverly v. State Line etc. R. R. Co.*, 848.
10. BURDEN OF PROOF OF NEGLIGENCE as alleged in the petition is upon the plaintiff, and the burden of proving negligence as alleged in the answer is upon defendant, while the jury is to determine the question from all the evidence, no matter by whom offered. *Murray v. Missouri etc. R'y Co.*, 601.
11. EVIDENCE OF, WHAT SUFFICIENT. — Evidence of defendant's negligence need not be direct and positive. The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence sufficient to rebut the presumption. *Rosenfield v. Arrol*, 584.
12. EVIDENCE OF. — FAILURE TO HAVE FLAGMAN at a railroad crossing, as required by a city ordinance, is negligence *per se* on the part of the railroad company. *Murray v. Missouri etc. R'y Co.*, 601.
13. EVIDENCE OF FORMER ACCIDENTS. — In an action to recover for personal injury received from falling into an opening on the sidewalk of a well-lighted street in a city, evidence that prior thereto other parties had fallen into the same opening, and that the owner of the building in front of which the opening was situated was aware of the facts, is inadmissible. *Mathews v. Cedar Rapids*, 436.
14. MASTER AND SERVANT — NEGLIGENCE OF INFANT. — Whether a boy thirteen years of age, who voluntarily assumes to assist the servants of a railroad company, at their request, in moving a loaded car, without the knowledge or consent of the company, and while thus engaged places himself in a dangerous place, in consequence of which he is killed, is guilty of negligence is for the jury to determine from the evidence. If he had sufficient capacity to know the distinction between good and evil, and to protect himself, he would be responsible for his conduct, and there could be no recovery; and if he did not have sufficient capacity, there might be a recovery, if the jury believed the company was negligent. *Rhodes v. Georgia R. R. etc. Co.*, 362.
15. RESPONSIBILITY OF INFANTS. — An infant under the age of ten years *prima facie* does not have sufficient capacity and knowledge to make him responsible for his conduct and acts, and capacity must be shown. An infant who has arrived at the age of fourteen years *prima facie* has such capacity, and want of it must be shown. Between the ages of ten and fourteen, the infant must be shown to have had capacity to comprehend and avoid danger, before he can be held responsible for his acts. The question is then for the jury, and not for the court, to determine. *Id.*

See BAILMENT, 2, 3; CARRIERS, 1-3, 12-15, 17; CORPORATIONS, 3; DAMAGES, 1-3, 5; EVIDENCE, 1-4, 8; JOINT LIABILITY, 2; LANDLORD AND TENANT; MASTER AND SERVANT; RAILROAD COMPANIES; TELEPHONE COMPANIES.

NEGOTIABLE INSTRUMENTS.

1. **INTEREST ON NOTE MADE IN ANOTHER STATE.** — A promissory note made and delivered in another state, and not made payable at any particular place, is payable in the state where made, and draws interest according to the laws of that state. *Clark v. Searight*, 868.
2. **PROMISSORY NOTE — PART PAYMENT BY JOINT MAKER — ESTOPPEL.** — Part payment by the joint maker of a note, and the erasure of his name therefrom, under an agreement that such payment and erasure should discharge his liability thereon, will not affect the validity of the note, nor release him from liability for the unpaid balance due thereon, whether such agreement was made with the payee, or by his authority, or not; nor is the latter thereby estopped, after failure to repudiate the erasure, and the subsequent insolvency of the other joint maker, to deny that the agreement and erasure were made by his authority. *Eldred v. Peterson*, 416.
3. **EFFECT OF INDORSEMENT BY THIRD PERSON.** — A third person who indorses a negotiable note concurrently with its execution, and at or before its delivery to the payee or indorsement by him, is presumptively liable only as a second indorser, but may be shown by parol evidence to be liable as a joint maker or guarantor, according to the intention of the parties as disclosed by the facts. In such case, however, it is essential to a recovery against such third person as an original promisor or joint maker, that the complaint contain special averments of the facts which operate to charge him as such, instead of as an indorser. *Deering v. Creighton*, 800.
4. **PARTIES PLAINTIFF.** — THE REAL PARTY IN INTEREST, within the meaning of the code requiring all actions to be prosecuted in the name of the real party in interest, is the person in whom the legal title to the claim is vested. Hence one in whose favor a draft is drawn may maintain an action to recover moneys paid thereon, though the drawer of the draft will be entitled to receive such moneys as soon as collected. *First Nat. Bank v. Hummel*, 257.
5. **PARTIES DEFENDANT.** — The drawer of a draft is a proper party defendant in an action by the payee to recover moneys which have been paid to a third person, to be by him transmitted to such payee, where the drawer will be entitled to such money when recovered, and he refuses to join in the action, the provision of the code upon the subject being, "that of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants, but if the consent of any one who should have been joined as a plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint." *Id.*
6. **ASSIGNMENTS — BILL OF EXCHANGE.** — An ordinary negotiable bill of exchange, unaccepted in writing, and not drawn against any particular fund, does not operate in the hands of the payee as a legal or equitable assignment of a debt due by account from the drawee to the drawer, nor can it so operate in the hands of the payee as collateral security for the payment of his debt so as to give him a preference over another creditor

of the drawer. Such creditor may therefore summon the drawee by garnishment at any time before the bill is accepted in writing or paid in full or in part, to the extent of the debt due. *Baer v. English*, 372.

7. **ASSIGNMENTS — BILL OF EXCHANGE — GARNISHMENT.** — The acceptance of a bill of exchange, to be binding, must be made in writing, and an oral promise to pay so much of it as may be found to be due, made by the drawee, will not act as an equitable assignment to the payee, so as to prevent other creditors of the drawer from securing the debt by garnishment against the drawee before the bill is accepted in writing or paid to the amount of the debt due. *Id.*

See **BILLS OF LADING.**

NEW COUNTIES.

See **COUNTIES.**

NEW POLICY.

See **INSURANCE, 29.**

NEWSPAPER PUBLICATIONS.

See **CONTEMPT, 1, 2; LIBEL.**

NEW TRIAL.

1. **INTOXICATION OF JUROR.** — Motion for a new trial on the ground of intoxication of a juror during the trial will not be sustained when the evidence on that point is conflicting and equally balanced. *State v. Lee*, 401.
2. **NEW TRIAL.** — **NEWLY DISCOVERED EVIDENCE** is not ground for a new trial in criminal cases. *Id.*

NON-RESIDENTS.

See **JUDGMENTS AND DECREES, 12, 13.**

NONSUIT.

See **APPEAL AND ERROR, 5; MASTER AND SERVANT, 12.**

NOTICE.

See **CHATTEL MORTGAGES, 1; CORPORATIONS, 8, 9; DEEDS, 2; EXECUTIONS, 5; FRAUDULENT CONVEYANCES, 8; INSURANCE, 5; LANDLORD AND TENANT, 6; MUNICIPAL CORPORATIONS, 11; PROCESS, 3; TRUSTS, 1; USURY.**

NUISANCE.

1. **STATUTE DECLARING THAT TO BE A NUISANCE AND A GROUND FOR INJUNCTION WHICH IS NOT.** — A statute to the effect that it shall be unlawful and presumptively injurious and dangerous to persons and property to drive piles or build cribs or other structures in a designated river, within the limits of R. County, and that the doing of such an act shall be enjoined at the suit of any resident tax-payer without proof that any injury or danger has been or will be caused by reason of such act, and shall also be enjoined at the suit of any owner or lessee of the right to use water in such river to operate any mill or factory within said county without proof of any further fact than that such act will

cause the water of such river to rise or set back, to some extent, at the place where the water used to operate such mill or factory is discharged into said river, is unconstitutional and void. *City of Janesville v. Carpenter*, 123.

2. INJUNCTION WILL NOT ISSUE TO RESTRAIN THE DRIVING OF PILES IN A RIVER, and the erection of a building thereon, where the injuries alleged as likely to ensue are, that if such building is erected the example will lead other persons to drive other piles and erect other buildings thereon in the same river, until the whole space fronting on a bridge across the river is occupied, and the flow of the water will be obstructed to a slight extent, there being no allegation that the proposed building will, in itself, do any harm, or that the defendant had not the right to erect it where he proposes to do. *Id.*
3. INJUNCTION WILL NOT BE ISSUED TO RESTRAIN A NUISANCE, public or private, unless it amounts to a material annoyance, inconvenience, discomfort, or hurt, and the violation of another's rights in an essential degree. The law gives protection only against substantial injury, and the injury must be tangible, or the comfort, enjoyment, or use must be materially impaired. *Id.*
4. INJUNCTION WILL NOT ISSUE AGAINST THE CONSTRUCTION OF A BUILDING, on the ground that it will be in violation of a city ordinance. *Id.*
5. NUISANCE, LIMITATION IN ACTION FOR. — When a nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once compensated. In such case, the statute of limitations begins to run upon the construction of the nuisance. *St. Louis etc. R'y Co. v. Biggs*, 174.
6. NUISANCE, LIMITATION IN ACTION FOR. — Where a structure is permanent in character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are injuries. In such case, the statute of limitations begins to run from the happening of the injury complained of. This rule is here applied in an action to recover damages for the overflow of land, caused by the defective construction of a railway embankment. *Id.*

See MUNICIPAL CORPORATIONS, 21-23.

NUNCUPATIVE WILLS.

See WILLS, 2, 3.

NURSE'S SERVICES.

See DAMAGES, 3.

OFFICERS.

1. PRESUMPTION. — Public officers are always presumed to perform the duties required of them by law. *Owen v. Baker*, 618.
2. MINISTERIAL ACTS — EVIDENCE. — County courts, in approving official bonds, act in a ministerial and not in a judicial capacity, and parol evidence is admissible to show that the court, when so acting, had full notice and knowledge of the fact that the name of one of the sureties had been erased without the knowledge or consent of the other sureties.

Notice to the court, when thus acting, may be shown by evidence which would be sufficient in case of other agents. *State v. McGonigle*, 609.

3. SURETY — ALTERATION. — A surety on an official bond has the right to stand upon the very terms of his contract; and any material alteration or variation of its obligation will discharge him, unless he consents to such alteration before it is made, or by some subsequent act ratifies it. *Id.*
4. EFFECT OF ERASURE OF NAME OF SURETY. — Where the county court approves an official bond, with full knowledge that the name of one of the sureties has been erased therefrom without the knowledge or consent of the other sureties, the bond is void as to them, as well as to another surety who afterwards signed without knowledge of such erasure. *Id.*
5. SPOILIATION of an official bond can occur only when it is the act of a stranger, without the participation of the parties interested; and while county officials having the custody of such bonds are strangers, within the rule, so that defacement of such bonds by them is but an act of spoliation, still, when such bond is altered by them before it is delivered or accepted, the doctrine of spoliation does not apply. *Id.*
6. EFFECT OF ERASURE OF NAME OF SURETY — ESTOPPEL. — Where the county court has approved an official bond, with knowledge that the name of a surety thereon has been erased without the knowledge or consent of the other sureties whose names appear thereon, the bond is void as to them; nor are they estopped, by knowledge that the officer, after such approval, entered upon and performed the duties of his office, to deny the validity of the bond, in the absence of evidence that they knew of the erasure. *Id.*

See COUNTIES; EXECUTIONS; MUNICIPAL CORPORATIONS, 14-20.

OFFICIAL BONDS.

See OFFICERS, 2-6.

OPTIONS.

See VENDOR AND VENDEE, 11, 12.

ORDINANCES.

See CRIMINAL LAW, 3, 19; MUNICIPAL CORPORATIONS, 1-3, 23; NUISANCES, 4; RAILROAD COMPANIES, 2.

OUTLAWED MORTGAGE.

See MORTGAGES, 3.

OWNER.

See INSURANCE, 11.

PAROL EVIDENCE.

See EVIDENCE, 5, 6; JURISDICTION, 4.

PARTIES.

See HUSBAND AND WIFE, 3; NEGOTIABLE INSTRUMENTS, 4, 5; PARTITION, 1-4; RELIGIOUS SOCIETIES.

PARTITION.

1. **TRUSTEE, WHEN PROPER PARTY.** — A trustee who has a power of sale and reinvestment under the trust deed, is a proper though not a necessary party to an action to partition the land among the beneficiaries. *Welch v. Agar*, 380.
2. **WHO ENTITLED TO.** — A creditor who holds an absolute deed from one of the tenants in common as security for his debt is only entitled to partition with the concurrence of the debtor or upon showing good cause why partition should be made. In the absence of such showing, partition should not be made in opposition to the debtor. *Id.*
3. **RIGHT OF REMAINDERMAN OR REVERSIONER TO MAINTAIN.** — Under the Oregon code, a remainderman or reversioner cannot maintain partition against the tenant for life in possession. They may be made defendants in such suit, but cannot sue as plaintiffs therein. *Savage v. Savage*, 795.
4. **WHO MAY MAINTAIN.** — Under the Oregon code, the right to sue in partition is given only to one having the actual or constructive possession of land sought to be partitioned. *Id.*
5. **RIGHT OF ENTRY NECESSARY TO MAINTAIN.** — When the tenant for life is in possession, and there is no present right of entry in the remainderman or reversioners, they are not constructively seised of the land, and neither can maintain a suit as plaintiff for partition. *Id.*

PARTNERSHIP.

ACCOUNTING BETWEEN FIRMS. — Where one who is a member of two firms sells the goods of one to the other as his own in payment of his pre-existing debt, each firm being ignorant of his connection with the other, a proper mode of accounting between them is to leave the interest of such party in the purchase price of the goods to stand as a credit on his account with the buying firm, while the remainder of the purchase-money is to be paid to the other members of the firm thus parting with the ownership of the goods. *Gray v. Church*, 348.

PARTY-WALLS.

1. **DEFINITION.** — "Party-wall" ordinarily means a dividing wall between two houses, to be used equally for all the purposes of an exterior wall by both parties, without any exclusive use by either. *Harber v. Evans*, 646.
2. **INJUNCTION TO PREVENT EXCLUSIVE USE.** — One who erects a party-wall under contract that either party may build it between their adjoining premises, one half thereof resting on each lot, the other party having the right to join to the wall, when erected, upon payment of one half of the value thereof, may be enjoined from placing windows and other openings in such wall, regardless of whether the other party intends to use the wall or not. *Id.*

PASSENGERS.

See CARRIERS, 7-19.

PAYMENT.

1. **CHECK ON BANK IS NOT PAYMENT**, but is only so when the cash is received on it; and there is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. *National Bank of Commerce v. Chicago etc. R. R. Co.*, 566.

- 2. RIGHT OF SELLER PAID BY CHECK TO RETAKE GOODS SOLD FOR CASH WHEN CHECK IS DISHONORED.** — Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods, also, is only conditional; and if the check on due presentment is dishonored, the vendor may retake the goods, even from an innocent subvendee for value, unless the original vendor has been guilty of such fraud or laches as will create an equitable estoppel against him. *Id.*

See JUDGMENTS AND DECREES, 20; LIENS; MORTGAGES, 3; NEGOTIABLE INSTRUMENTS, 2.

PERPETUITIES.

See WILLS, 9-14.

PERSONAL INJURIES.

See APPEAL AND ERROR, 4, 6; ASSIGNMENT, 1; CARRIERS; DAMAGES, 1-3, 5; EVIDENCE, 1-4, 8; NEGLIGENCE, 2, 3, 7, 8; WITNESSES, 3.

PERSONAL RIGHTS.

See STATUTES, 4.

PERSONS ON TRACK.

See RAILROAD COMPANIES.

PHOTOGRAPHER.

PHOTOGRAPHER, RIGHT OF, TO USE NEGATIVE OF CUSTOMER. — The contract between a photographer and his customer includes, by implication, an agreement that the negative for which the customer sits shall only be used for the printing of such photographic portraits as he may order or authorize, and an action lies for a breach of this implied contract. *Moore v. Rugg*, 539.

PIERS.

See WATERCOURSES.

PLEA IN ABATEMENT.

See ABATEMENT.

PLEADING.

- 1. MISJOINDER OF CAUSES OF ACTION.** — A complaint showing that plaintiff is entitled to recover a sum of money for the benefit of another, and that the latter will not join in the action, and that he is therefore made a party defendant, and praying, among other things, that plaintiff be allowed a reasonable sum for his costs and expenses, and that such defendant be required to pay such sum, does not unite different causes of action. *First Nat. Bank v. Hummel*, 257.
- 2. PLEADING EXHIBITS.** — A schedule not recited in full in a pleading can only be made part thereof by marking it so that it can be identified, and reciting in the pleading that such exhibit is so marked and made part of it. *Caspary v. Portland*, 842.

3. **SHAM PLEADING IS ONE GOOD IN FORM, BUT FALSE IN FACT;** one entered for the mere purpose of delay, concerning a matter which the pleader knows to be false. *Patrick v. McManus*, 253.
 4. **ANSWER OR COUNTERCLAIM MAY BE STRICKEN OUT AS SHAM,** upon affidavits showing that it is false, where such affidavit is not contradicted in material respects by counter-affidavits; but if there is conflicting evidence regarding the truth of the defense, it cannot be stricken out; for a trial before the court upon affidavits cannot be substituted for a jury trial in the ordinary mode. *Id.*
 5. **AMENDMENT CHANGING NATURE OF ACTION.** — Plaintiff will not be allowed to amend his declaration so as to enable him, instead of recovering the land sued for, to have judgment for the amount paid out by him as purchaser at a foreclosure sale thereof, and for the sale of the land to repay such amount. *Hobby v. Bunch*, 301.
- See CONSPIRACY; INSURANCE, 30; JUDGMENTS AND DECREES, 9, 21; JUSTICE OF THE PEACE, 2; NEGOTIABLE INSTRUMENTS, 4, 5; SCHOOLS, 1, 2; SCIRE FACIAS, 1.**

POLITICAL ASSOCIATIONS.

See ASSOCIATIONS.

POSSESSION.

See ESTATES; LANDLORD AND TENANT, 6.

POWER OF APPOINTMENT.

See WILLS.

PRACTICE.

See APPEAL AND ERROR; TRIAL; WITNESSES.

PRESCRIPTION.

See WATERCOURSES, 5, 8-10.

PRESUMPTIONS.

See CRIMINAL LAW, 13, 14; EXECUTORS AND ADMINISTRATORS, 11-14; INSURANCE, 26-29; JUDGES, 1; JUDGMENTS AND DECREES, 16, 17, 20; MARRIAGE AND DIVORCE, 2; MASTER AND SERVANT, 6, 7, 8; NEGLIGENCE, 11; NEGOTIABLE INSTRUMENTS, 3; OFFICERS, 1; PAYMENT, 1; TRUSTS, 2.

PRICE.

See SALES.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SET-OFF, 1, 2; SURETIES.

PRIORITIES.

See EXECUTIONS, 1.

PRIVATE WAYS.

1. **WHERE A WAY OF NECESSITY IS OBSTRUCTED** by one across whose land it runs, the person entitled to such way may cross such lands at some other convenient place in order to reach the highway. *Johnson v. Borson*, 146.
2. **PRIVATE WAY, RIGHT TO MAINTAIN BARS ACROSS.** — While one over whose lands another has a private way may lawfully maintain a reasonable bar-way at the end of such way, he has no right to maintain any unreasonable obstruction across the way, and whether a bar-way actually maintained is reasonable or not is a question for the jury. *Id.*
3. **CO-TENANTS OF A RIGHT OF WAY.** — If two or more persons are co-tenants of an alley which is subject to an agreement that it shall be used for no other purpose than as an alley for the mutual benefit of the owners of the property on each side thereof, one of them has no right to obstruct the alley by building a wooden frame across it, and putting up hooks and slides of metal to hang and slide beef and other meat on. Nor is the right of the other parties in interest to enjoin such use of the alley impaired by the fact that they are not damaged thereby. They are entitled to stand on their strict legal rights, whether they are damaged or not. *Swift v. Cocker*, 347.

PRIVIES.

See CONTRACT; INJUNCTIONS, 1; USURY, 4.

PRIVILEGE.

See PROCESS, 4, 5.

PROBATE COURT.

See JUDGMENTS AND DECREES, 16, 17.

PROCESS.

1. **JUDGMENT PROCESS, SERVICE OF, WHEN INOPERATIVE.** — When process is required to be personally served, a service by leaving a copy at the defendant's residence is no service at all. *Hobby v. Bunch*, 301.
2. **SERVICE BY PUBLICATION, IN PERSONAL ACTION, ON PERSONS WITHIN STATE NOT DUE PROCESS OF LAW.** — In actions in *personam* strictly judicial in their character, and proceeding according to the course of the common law, service of the summons by publication, upon resident defendants who are personally within the state, and can be found therein, is not due process of law. And a statute which assumes to authorize such service in actions to foreclose mortgages is unconstitutional and void. *Bardwell v. Collins*, 547.
3. **THE RETURN OF PROCESS IS A PART OF THE RECORD,** and must be noticed even by a purchaser, though the judgment recites service thereof. *Hobby v. Bunch*, 301.
4. **PRIVILEGE.** — SUITOR OR WITNESS IN ATTENDANCE UPON THE TRIAL OF ANY CASE IN COURT IS EXEMPT from the service of any writ or summons upon him; and if he is served with such writ while so in attendance on the court, he may either have the service vacated on motion, or file a plea in abatement of the suit or summons, and insist, by his plea, upon his privilege. *Thornton v. American Writing-machine Co.*, 320.
5. **PRIVILEGE.** — SERVICE OF PROCESS ON A SUITOR OR WITNESS, WHEN HE IS IN ATTENDANCE IN COURT, IS NOT VOID, though voidable. If he does not

claim his privilege in any manner, but remains silent, and judgment is entered against him, it is valid, and the court will not vacate it on his motion, made nearly eighteen months after its entry. *Id.*

See EXTRADITION; INFANTS, 2; JUDGMENTS AND DECREES, 5-9, 18; JURISDICTION, 4; JUSTICE OF THE PEACE, 1; MORTGAGES, 5.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS; TRUSTS, 10; USURY; VENDOR AND VENDEE, 16.

PROOFS OF LOSS.

See INSURANCE, 20-28.

PROXIMATE CAUSE.

See NEGLIGENCE, 4, 5.

PUBLIC LANDS.

RIPARIAN RIGHTS OF HOMESTEAD SETTLER THEREON.—The riparian rights of a settler upon the public lands of the United States, with the intention of claiming the land under the homestead laws, attach from the date of his settlement, provided he complies with the law, and obtains a patent for the land. When such patent issues it relates back to the settlement, and cuts off the right to divert any stream of water running through such homestead. *Faul v. Cooke*, 836.

See HOMESTEAD.

PUBLICATION.

See LIBEL; PROCESS, 2.

PUNISHMENT.

See CRIMINAL LAW, 3.

PURCHASE-MONEY.

See MORTGAGES, 1.

QUARRELING.

See CRIMINAL LAW, 19.

QUESTIONS OF FACT.

See FRAUDULENT CONVEYANCES, 6, 8; INSURANCE, 31; MARRIAGE AND DIVORCE, 2, 3; MASTER AND SERVANT, 14; MUNICIPAL CORPORATIONS, 12; NEGLIGENCE, 5-10, 14, 15; TRESPASS; VENDOR AND VENDEE, 15.

QUITCLAIM DEEDS.

See DEEDS, 2.

RAILROAD COMPANIES.

1. DUTY TO EMPLOYEES OF DIFFERENT COMPANIES IN COMMON SWITCH-YARD.—Where a common switch-yard is used by different railroad companies, each having its own track passing very close to each other, each company owes the same duty as to care to the employees.

of the other necessarily upon its track in the discharge of their duty as it owes to its own employees upon its own track under similar circumstances. *McMarshall v. Chicago etc. R'y Co.*, 454.

2. **UNDUE SPEED IN VIOLATION OF ORDINANCE AS NEGLIGENCE.** — In an action to recover for injury from being struck by a railroad engine, proof that it was being run at a rate of speed in violation of a city ordinance at the time of the accident is evidence of negligence, when the jury is justified in finding that the engine might have been stopped in time to avoid the accident if it had been running at a slower rate of speed and that the injured party trusted to defendant's employees to run the engine at lawful speed. *Id.*
3. **NEGLECT — INSTRUCTIONS.** — Where, in an action to recover for personal injury to a railway employee from being struck by the locomotive of another company, it is alleged that defendant was negligent because its engine was managed and controlled by incompetent employees, who failed to see the injured party in time to give alarm signals, and it is shown that the place of accident was a railroad yard in a city, used by several companies together, whose tracks were in close proximity to one another, an instruction that if the injured employee was in the discharge of his duties at the time of the accident, and the employees of defendant were not on the lookout, and had its engine in the possession of or under the control of an incompetent person, it would be guilty of negligence, is proper and unobjectionable. *Id.*
4. **NEGLECT — FAILURE OF RAILROAD EMPLOYEE TO "LOOK OUT."** — Where, in an action to recover for personal injuries from being struck by a railroad engine, it is shown that several persons at the scene of the accident, not charged with the duty of watching the track, saw the injured party before he was struck, it may be inferred that the party operating the engine, who was charged with the duty of watching the track, did not "look out," and was therefore guilty of negligence. *Id.*
5. **NEGLECT — INCOMPETENCY OF FIREMAN.** — Where, in an action to recover for injury in being struck by a railroad engine, it is shown that, at the time of the accident, such engine was in charge of a fireman, this fact, in connection with a failure to promptly stop the engine, tends to show the fireman's incompetency as an engineer, and the negligence of his employer. *Id.*
6. **NEGLECT — FAILURE TO SIGNAL.** — Where, in an action to recover for injury from being struck by a railroad engine, the evidence is conflicting on the issue of defendant's negligence in failing to give proper signals by ringing the bell, it is properly submitted to the jury as an issue of fact. *Id.*
7. **NEGLECT — PERSON ON TRACK.** — In an action to recover for injuries received by the employee of one railroad company by being struck by the engine of another, an instruction that joint occupancy of ground for railroad purposes by two or more companies will impose on each the duties to the employees of the other necessarily using the track which it owes to its own employees is not erroneous as assuming that the occupancy of the ground in the case before the court was joint, and that the use of the track by the injured employee was necessary. *Id.*
8. **NEGLECT OF EMPLOYEE ON TRACK — DUTY TO LOOK AND LISTEN.** — Where, in an action to recover for injuries to an employee of one railroad company from being struck by the engine of another, it is shown that the tracks of the two companies were very close to each other; *Am. St. Rep.*, Vol. XX. — 65

that such employee and the other employees of his company were accustomed to step upon the track of the defendant company to make signals, which were necessary to the protection of both companies; that this custom was acquiesced in and not objected to by the defendant company; and that such employee had stepped upon its track for the purpose of signaling at the time of the accident, — he was not a trespasser so as to preclude him from recovering, nor does the rule that a person on the track is required to “look and listen” apply in such a case. *Id.*

9. **NEGLIGENCE — DUTY OF RAILWAY CORPORATION TO PERSON APPROACHING THE TRACK.** — The mere fact that a traveler is approaching the track is not sufficient to require the engineer to give an alarm or to stop his engine when it is broad daylight, the engine visible, the bell ringing, and the traveler is an adult in apparent possession of his senses, and looking toward the train. In such a case, the engineer may act on the supposition that the traveler will stop; but he must not rest upon this supposition so long as to allow his engine to reach the point where it will become impossible for him to control his train, or give warning in time to prevent injury to the traveler, supposing the latter to continue his course. *Heddes v. Chicago etc. Ry Co.*, 106.
10. **DUTY TO STOCK ON TRACK.** — The duty which a railroad company owes to the owner of stray stock upon its track is, that the engineer in charge of the train at the time shall use ordinary or reasonable care, after the stock is discovered by him, to prevent injury to it. It is not negligence for a railroad company to fail to keep a lookout for stock. *Memphis etc. R. R. Co. v. Kerr*, 159.
11. **LIABILITY FOR KILLING STOCK — BURDEN OF PROOF.** — A railway company, by permitting cotton-seed to accumulate on or about its track, is under obligation to maintain reasonable care to prevent injury to stock attracted thereby, and if an animal is killed while feeding on such seed, the company must assume the burden of proving that it exercised reasonable care to prevent the killing. *Railway v. Dick*, 190.

See CARRIERS; NEGLIGENCE; WITNESSES, 3.

RAPE.

See CRIMINAL LAW, 28, 29.

RECEIPT.

See WAREHOUSEMEN.

RECEIVERS.

See JURISDICTION, 2; VENDOR AND VENDEE, 7.

REDEMPTION.

See MORTGAGES, 6.

REGISTRATION.

See CHATTEL MORTGAGES, 1; FRAUDULENT CONVEYANCES, 3.

RELEASE.

See JOINT LIABILITY, 1; SCHOOLS, 9.

RELIEF AGAINST JUDGMENT.

See JUDGMENTS AND DECREES.

RELIGIOUS SOCIETIES.

INJUNCTION TO RESTRAIN SALE OF CHURCH PROPERTY — PARTIES. — Where a church building has been erected by voluntary contributions made under agreement that the building is to be used for certain specified purposes, a contributor may enjoin a sale of the property, where no sufficient reason is shown for the attempted sale and its effect would be to divert the funds from the use intended. It is not necessary for all of the contributors to join in the suit to restrain such sale. *Avery v. Baker*, 672.

See EVIDENCE, 7.

REMAINDERMEN.

See ESTATES; PARTITION, 3-4.

REMAINDERS.

See WILLS.

REMEDY.

See MUNICIPAL CORPORATIONS, 7, 18-20; VENDOR AND VENDEE, 6.

REMOTE DAMAGES.

See CARRIERS, 8, 9.

REMOVAL OF CAUSES.

See ATTACHMENT AND GARNISHMENT, 2.

REPAIR OF PREMISES.

See LANDLORD AND TENANT.

REPLEVIN.

1. **TO ASSERT THAT LIEN OF MORTGAGE STILL EXISTS** after payment of the mortgage debt is a fraud on the mortgagor's execution creditors, and they may levy upon the property without making the levying officer liable in replevin for the return of the property to the mortgagee. *Muel-ler v. Provo*, 525.
2. **APPRAISED VALUE OF PROPERTY** taken in replevin is not conclu-sive, but is accepted only in the absence of evidence more satisfactory. Still, if such valuation is not contested, it will be deemed to be satisfac-tory. *Id.*
3. **WAIVER OF RETURN OF PROPERTY.** — In replevin against an officer for property seized under execution, he may waive a return of the property, and take judgment for the amount of his lien already established by the first judgment; and the acceptance of a verdict for the value of the lien, and causing judgment to be entered thereon, is sufficient evi-dence of his election to waive a return. *Id.*

REPUTATION.

See CRIMINAL LAW, 20-21.

RESALE.

See JUDICIAL SALES, 1-3.

RESCISSION.

See SALES, 2; VENDOR AND VENDER, 2-12.

RES JUDICATA.

See ASSOCIATIONS, 8; JUDGMENTS AND DECREES, 14, 15.

RESIDENCE.

See INSURANCE, 13.

REVERSED JUDGMENT.

See BAILMENT, 5.

REVERSIONERS.

See ESTATES; PARTITION.

REVOCATION.

See TRUST DEEDS.

RIGHT OF APPEAL.

See JUDGMENTS AND DECREES, 1-4.

RIGHT OF WAY.

See PRIVATE WAYS.

RIPARIAN RIGHTS.

See PUBLIC LANDS; WATERCOURSES.

ROBBERY.

See CRIMINAL LAW, 30, 31.

SAFE MACHINERY.

See MASTER AND SERVANT.

SALES.

1. **PRICE OF GOODS SOLD FOR UNLAWFUL USE MAY BE RECOVERED WHEN.** — One who sells goods to a person known to him to be the keeper of a house of prostitution, without knowing just what was to be done with the goods, but supposing that she would sell or use them in her brothel, may, no other facts appearing, recover the price thereof in an action against her. *Anheuser-Busch B. Ass'n v. Mason*, 580.
2. **A DEFECT IN QUALITY OF A PART OF AN INSTALLMENT** of property purchased does not entitle a purchaser to reject a subsequent installment which is free from defects, where neither party shows any intention to abandon or rescind a contract of purchase. *Miller v. Moore*, 329.
3. **USAGE CONTRARY TO LAW.** — If a state law raises a warranty in favor of a purchaser, he cannot be deprived of its benefits by showing a local usage to the effect that one who receives an article and pays for it is deemed

to release all claims for defects or quality, unless he is shown to have recognized and adopted such usage in his own business. *Id.*

4. WARRANTY. — THE DESCRIPTIVE WORDS "No. 2 white mixed corn, bulk," comprehend quality as well as variety, and imply a warranty on the part of the seller as to both. *Id.*
5. WARRANTY. — INSPECTION BY THE BUYER BEFORE ACCEPTANCE will not deprive him of the protection of a warranty as to latent defects. If a car of corn was "false packed," by placing sound corn upon the surface and that which was musty some two feet beneath, the musty corn should be regarded as a latent defect, and the purchaser is not, by his acceptance of a car, after an inspection which did not discover the fraud, precluded from subsequently recovering upon a warranty that the corn was of good quality. *Id.*

See APOTHECARIES; CARRIERS, 7; PAYMENT, 2; VENDOR AND VENDEE.

SATISFACTION.

See JOINT LIABILITY, 1.

SCHOOLS.

1. CONSTITUTIONAL LAW — BIBLE-READING IN COMMON SCHOOLS — SUFFICIENCY OF PETITION. — A petition for a writ of *mandamus* to compel the discontinuance of the reading of the Bible in the common schools, alleging that petitioners are taxed for the support of such schools, and are equally entitled to the benefit thereof, and that such reading therein is contrary to the rights of conscience, is sectarian instruction, and is prohibited by section 3 of article 10 of the Wisconsin constitution, is sufficiently broad to cover any valid objection which may be made to such reading. *State v. District Board*, 41.
2. CONSTITUTIONAL LAW — BIBLE-READING IN COMMON SCHOOLS — ALLEGATIONS NOT ADMITTED BY DEMURRER. — Allegations in the answer to a petition for a writ of *mandamus* to compel the discontinuance of Bible-reading in the common schools, that such reading is not sectarian education, and that there is no material difference between the King James version of the Bible read in such schools, and the Douay version, are not admitted by demurrer. The former allegation is a conclusion of law, while the latter is not well pleaded, being against common knowledge. *Id.*
3. CONSTITUTIONAL LAW — BIBLE-READING IN COMMON SCHOOLS. — The reading of any version of the whole Bible in the common schools as a text-book without restriction, and though not accompanied by any comment by the instructor, is "sectarian instruction" within the meaning of section 3, article 10, of the Wisconsin constitution, and is thereby prohibited; nor is the prohibition removed by the fact that any child may withdraw from such school-room during such reading. *Id.*
4. CONSTITUTIONAL PROHIBITION AGAINST THE READING OF THE BIBLE in common schools as a text-book does not extend to such other text-books as are founded upon the fundamental teachings of the Bible, or which contain extracts therefrom, not sectarian in their nature. *Id.*
5. CONSTITUTIONAL LAW — BIBLE-READING IN PUBLIC SCHOOLS. — Where the constitutional prohibition against sectarian education in the common schools is framed in clear and unambiguous words, such words are controlling rather than an interpretation in the light of surrounding facts

existing at the time of the adoption of such constitution. The reading of the Bible in such schools, as a text-book, need not be specifically included in the constitutional prohibition against sectarian instruction therein, in order that such reading may be excluded by its terms. *Id.*

6. CONSTITUTIONAL LAW — BIBLE-READING IN COMMON SCHOOLS, as a text-book, is religious worship, and constitutes the school-house, for the time being, a place of worship, and such reading during school hours, against the consent of a tax-payer, compels him to support a place of worship within the meaning of section 18 of article 1 of the Wisconsin constitution, declaring that "no man shall be compelled . . . to erect or support any place of worship." *Id.*
7. CONSTITUTIONAL LAW. — BIBLE-READING IN COMMON SCHOOLS, as a text-book, is sectarian instruction, and the money drawn from the state treasury for the support of such schools, where such reading is practiced, is "for the benefit of a religious seminary," within the meaning of section 18, article 1, of the constitution of Wisconsin, prohibiting such appropriation of the state funds. *Id.*
8. MONEY OF SCHOOL DISTRICT LOST BY BURGLARY, LIABILITY OF TREASURER FOR. — The fact that the treasurer of a school district has lost the funds of the district by burglary without his fault does not constitute a defense to an action on his official bond for failure to pay over to his successor in office money received, but never paid out, by him, where neither the statute nor the bond contemplates any other mode by which he is to be relieved from accountability than by payment of the money received by him. *Board of Education v. Jewell*, 586.
9. RELEASE BY SCHOOL DISTRICT OF TREASURER FOR MONEY STOLEN FROM HIM INEFFECTUAL. — A vote of the electors of a school district, and of its board of education, without consideration, to discharge the treasurer of the district from liability for money stolen from him without his fault, is legally ineffectual to discharge him from his obligation. *Id.*

See MUNICIPAL CORPORATIONS, 21.

SCIRE FACIAS.

1. NO ANSWER TO A SCIRE FACIAS WILL BE SUSTAINED, if it states matters which would have constituted a defense to the original action. *Shupp v. Hoffman*, 476.
2. JUDGMENT AGAINST A MARRIED WOMAN IS NOT VOID, and therefore, to a *scire facias* based upon an unconditional judgment, it is not sufficient to plead that the defendant, at the time of its recovery, and of the execution of the obligation on which it was founded, was a married woman. *Id.*

SEDUCTION.

See MARRIAGE AND DIVORCE, 1.

SEISIN.

See ESTATES; PARTITION, 5.

SELF-DEFENSE.

See CRIMINAL LAW, 4.

SERVICE.

See PROCESS.

SET-OFF.

1. **SET-OFF OF DEBT DUE PRINCIPAL IN ACTION AGAINST SURETY.** — In an action against a surety the defendant may set off a debt due from the plaintiff to the principal debtor, if the latter is a party and is insolvent. *Becker v. Northway*, 543.
2. **INTERVENTION BY PRINCIPAL IN ACTION AGAINST SURETY.** — Where a surety is sued alone, the principal debtor may intervene in the action and set off a debt due him from the plaintiff. *Id.*
3. **SET-OFF, BREACH OF CONTRACT INVOLVING TORT MAY BE USED AS.** — A breach of contract, though it also involve a tort, may be used as a set-off. *Id.*

See BANKS AND BANKING; CORPORATIONS, 14.

SHAM PLEADING.

See PLEADING.

SHELLEY'S CASE.

See WILLS, 8.

SHERIFFS.

See SHERIFF'S DEED.

SHERIFF'S DEED.

1. **WHO IS PROPER OFFICER TO EXECUTE — ADVERSE POSSESSION.** — The sheriff in office at the time that the certificate of sale under execution is produced and the deed demanded is the proper officer to execute the deed. In such case, a claim of adverse possession cannot be based upon a deed executed by the officer who made the sale, and whose term of office had expired at the time of the execution of the deed, especially when such possession has not been open, notorious, exclusive, and continuous for the necessary period of time. *Faulk v. Cooke*, 535.
2. **As EVIDENCE ON COLLATERAL ATTACK.** — A sheriff's deed which recites a judgment against three defendants, and a direction to levy against one only, whose land is levied upon and sold, is sufficient in a collateral proceeding to support the sheriff's sale in pursuance of which the deed was made. *Owen v. Baker*, 618.
3. **RECITALS — TIME OF COMMENCEMENT OF LIEN.** — The time fixed by law for the commencement of a judgment lien cannot be changed by the recitals in a sheriff's deed. *Id.*
4. **ACKNOWLEDGMENT.** — Where the clerk of the circuit court is also recorder of deeds, the addition in the acknowledgment of a sheriff's deed of the word "recorder," after the name of the clerk, will not vitiate the deed. *Id.*
5. **CERTIFICATE OF ACKNOWLEDGMENT of sheriff's deed** may be supported by reference to the language of the conveyance itself. *Id.*

SHERIFF'S RETURN.

See ATTACHMENT AND GARNISHMENT, 1, 2.

SIDEWALKS.

See MUNICIPAL CORPORATIONS.

SOCIAL CLUBS.

See ASSOCIATIONS, 3-8.

SPECIFIC PERFORMANCE.

See AGENCY, 1.

SPRINGS.

See WATERCOURSES, 12, 13.

STATUTES.

1. STATUTE IS VOID BECAUSE IT USURPS THE JUDICIAL POWER of the courts, if it adjudicates an act unlawful and presumptively injurious and dangerous, when it is not so, and commands the courts to enjoin it without proof that any injury or danger has been or will be caused by it. *City of Janesville v. Carpenter*, 123.
 2. STATUTE IS UNCONSTITUTIONAL AS DISCRIMINATING AND CLASS LEGISLATION, if its operation is restricted to part of a river within a county, and it makes acts unlawful there which in all other parts of that river and in all other rivers are lawful, and gives to a class of persons the advantage of maintaining actions without proof that any injury or danger has been or will be caused to them. *Id.*
 3. Though a statute does not violate any special clause of the constitution, it may be a violation of its essential spirit, purpose, and intent, and contrary to public justice, and therefore unconstitutional and void. *Id.*
 4. PERSONAL RIGHTS. — Any person may pursue any lawful calling in his own way, not encroaching upon the rights of others. It is not competent to forbid any person or class of persons, whether citizens or resident aliens, offering their services in a lawful business, or to subject others to penalties for employing them, unless the nature of the work is such as makes it unfit for certain persons, as for females and infants. *Ex parte Kuback*, 226.
- See ACTIONS; EXECUTIONS, 8; EXECUTORS AND ADMINISTRATORS, 1; JOINT LIABILITY, 2; MUNICIPAL CORPORATIONS, 7; NUISANCES, 1; SCHOOLS; TRUSTS, 8.

STOCK AND STOCKHOLDERS.

See ASSOCIATIONS, 2; CORPORATIONS, 4-10.

STOCK ON TRACK.

See RAILROAD COMPANIES, 10, 11.

STREETS.

See HIGHWAYS; INJUNCTIONS, 2; MUNICIPAL CORPORATIONS.

SUBROGATION.

See EXECUTORS AND ADMINISTRATORS, 9.

SUMMONS.

See PROCESS.

SURETIES.

See ATTACHMENT AND GARNISHMENT, 9, 10; OFFICERS, 3-6; SET-OFF, 1, 2.

SURFACE WATER.

See MUNICIPAL CORPORATIONS, 4.

SURRENDER OF POLICY.

See INSURANCE, 32.

TELEPHONE COMPANIES.

TELEPHONE-POLES, LIABILITY FOR INJURIES RESULTING FROM. — One injured by his team, while frightened and running along a public highway, coming into collision with a telephone-pole which had been placed therein by authority of law, cannot recover of the telephone company therefor, where it appears that the poles were set in such highway with due care, and as near the side thereof as they could be placed without encroaching upon adjacent property. *Roberts v. Wisconsin Telephone Co.*, 143.

TENDER.

See VENDOR AND VENDEE, 10.

THREATS.

See CRIMINAL LAW, 31.

TICKETS.

See CARRIERS, 7.

TORTS.

See ABATEMENT, 2; JOINT LIABILITY; MUNICIPAL CORPORATIONS, 15; SET-OFF, 3.

TRADE-MARKS.

TRADE NAME — INFRINGEMENT. — A loan and trust company cannot exclusively appropriate the state name and geographical word "Nebraska" as a trade name by incorporating under the name "Nebraska Loan and Trust Company," and enjoin others in the same business from using the same name, where there is no conflict of interest nor opportunity for the public to be deceived. The rules applicable to trade-marks upon manufactured goods do not apply to such a case. *Nebraska L. & T. Co. v. Nine*, 686.

TRADE NAME.

See TRADE-MARKS.

TRAVELERS.

See INNKEEPERS.

TREASURERS.

See COUNTIES; SCHOOLS, 8, 9.

TRESPASS.

DAMAGES FOR WILLFUL JOINT TRESPASS, HOW ESTIMATED. — In an action to recover damages for a willful joint trespass, the jury should estimate

the damages against all the guilty defendants according to the amount which they think the most culpable should pay; but where the jury have improperly apportioned and severed such damages between the defendants, the plaintiff may cure the irregularity by entering a *nolle prosequi* as to all but one, taking judgment against him only. *Warren v. Westrup*, 578.

See HIGHWAYS, 1; JOINT LIABILITY; WATERCOURSES, 11.

TRIAL.

1. **ANSWER NOT RESPONSIVE TO THE QUESTION ASKED** may be stricken out on motion of the party who deems himself injured thereby; but if he does not make such motion, he cannot hold his adversary responsible for the answer, nor successfully seek a new trial on the ground that it was given. *Heddles v. Chicago etc. R'y Co.*, 106.
2. **WHERE PLAINTIFF'S WITNESS** has been allowed to answer a question of doubtful competency, it is error to refuse to allow defendant's witness to answer practically the same question. *Kelley v. Detroit etc. R. R. Co.*, 514.
3. **JURY AND JURORS — RIGHT TO CORRECT VERDICT.** — Where the jury, by mistake, has rendered a verdict for defendant, and the mistake is immediately discovered, and attention called to it, the jury may retire and correct the verdict, so as to make it stand in favor of plaintiff, as was originally intended. *Bialock v. Waldrup*, 348.
4. **VERDICT. — FAILURE TO PASS ON SPECIAL ISSUES** will not vitiate a general verdict supported by evidence on other points involving the same questions. *McMarshall v. Chicago etc. R'y Co.*, 454.
5. **REFUSAL OF COURT TO MAKE FINDINGS IS ERROR WHEN.** — Where, in an action against a bailee to recover for property wrongfully permitted by him to be appropriated by the bailor's creditors under a judgment against the bailor, there is evidence tending to show, and plaintiff's counsel requests the court to find, that said judgment was entered upon an offer of judgment made by an attorney for plaintiff without authority and in fraud of her rights; that the execution thereon was issued after the attachment in the case was dissolved, and that it directed the sale of the attached property in the same manner as if the attachment was in force; that the execution was issued to a person who had no authority to serve it or to sell the property, and that the sale thereunder was itself fraudulent and unfair, — it is error for the court to refuse to find on these matters, as without findings thereon it cannot be legally determined that the property came to the plaintiff's use, or that she had the benefit thereof. *Roberts v. Stuyvesant S. D. Co.*, 718.
6. **ASSIGNMENT OF ERROR NOT CONSIDERED WHEN.** — An assignment of error to the admission of testimony which does not give the offer made nor the substance of the testimony admitted under it, and does not show any exception sealed, although it quotes the objections made to the admission thereof, will not be considered. *Burson v. Fire Ass'n*, 919.
7. **WHEN THE COURT MAKES A MISTAKE** in stating evidence to the jury, from want of distinct recollection of it, it is the duty of counsel to suggest its correction at once, and failing to do so, he waives the error by his silence. *Muetze v. Tuteur*, 115.
8. **INSTRUCTIONS, OMISSION OF, WHEN NOT ERROR.** — Where instructions are given as to all issues raised by the pleadings about which there is any dispute, no prejudice results from the omission to instruct in regard to a

defense technically presented by a general denial. *Hollingsworth v. Holbrook*, 411.

See APPEAL AND ERROR; HUSBAND AND WIFE, 7; INSURANCE, 19; NEW TRIAL.

TROVER.

See AGENCY, 4; HIGHWAYS, 1; USURY, 3.

TRUST DEEDS.

POWER TO REVOKE. — A trust deed containing no power of revocation, executed by a single woman, and not in contemplation of marriage, conveying her property in trust to pay to her the income during life, and at her death, in trust for her appointees, or in default of appointment, in trust for her heirs, creates a passive trust, which the grantor may revoke at any time, and call for a reconveyance, especially when it appears that there was no intention to make an irrevocable gift, and that the deed was executed without the advice of counsel, and upon the assurance by the contingent beneficiaries that it could be revoked, and that the only purpose of its execution has been accomplished. *Bristol v. Tasker*, 853.

See CORPORATIONS, 11-15; DEEDS, 3.

TRUSTS.

1. **TRUSTS, NOTICE OF.** — The addition of the word "trustee" to the name of a person is notice of a trust, and calls for inquiry and examination. *Marbury v. Ehlen*, 467.
2. **TRUSTEE IS PRESUMED TO HOLD PROPERTY FOR ADMINISTRATION, AND NOT FOR SALE.** *Id.*
3. **TRANSFERS IN CONTRAVENTION OF TRUST RATIFIED BY SOME OF THE BENEFICIARIES.** — IF A PORTION OF TRUST PROPERTY IS TRANSFERRED in contravention of the trust under which it was to be held for the benefit of the trustee's children which he should have at any time during his life, and all the beneficiaries in being, except one, ratify the transfer, the whole of the trust property so transferred may be recovered for the purpose of holding it under the trust until the death of the original trustee, before which time it will be impossible to ascertain all the beneficiaries who may become entitled thereto, and when that event arrives, the persons to whom the transfers were made will be subrogated to the interests of all the beneficiaries who ratified such transfers, and will not be compelled to permit those who have not ratified, to elect to take their share wholly out of the portion improperly transferred. *Id.*
4. **TRUST FOR COVERTURE FALLS IF THERE IS NO MARRIAGE** in fact or in contemplation, or if the *cestui que trust* becomes discoverd by the death of her husband; and the fact that the trust imposes active duties upon the trustee does not prevent this result. *Kuntzleman's Trust Estate*, 909.
5. **ACTIVE TRUST WILL BE SUSTAINED WHEN.** — Where an active trust is created to give effect to a well-defined lawful purpose of a testator in relation to his family, the trust will be sustained, whether the *cestui que trust* be *sui juris* or not. Where, therefore, the testator's object was by means of the trust to protect the *corpus* of the estate for the parties entitled in remainder, the trust will be upheld in support of the remainder. *Id.*
6. **BANKS — DECEASED TRUSTER, MONEY IN HANDS OF.** — The owner of money which has been received by another as his trustee, or in a fiduciary capa-

city, can recover it or its equivalent wherever the same can be followed, no matter what form it may take. Hence, if money has been paid to a private banker, to be by him transmitted to the party entitled thereto, and the banker suddenly dies before it is transmitted, and while it remains in his possession, but mingled with other moneys, his administrator is not entitled to retain possession thereof as assets of his estate, and is subject to an action for the recovery of the money so paid, if he refuses to pay or transmit to the owner. *First Nat. Bank v. Hummel*, 257.

7. **DEATH OF TRUSTEE OR FIDUCIARY CANNOT INCREASE HIS ESTATE BY ADDING TO IT ALL PROPERTY IN HIS HANDS.** If he has moneys received in his fiduciary capacity, which he has mingled with his own funds, they do not become a part of his estate, and his administrator must, on demand, deliver them to their owner. *Id.*
8. **STATUTE CLASSIFYING CLAIMS AGAINST THE ESTATE OF A DECEDENT,** and directing the order in which such claims shall be paid, has no application to moneys in his hands at the time of his decease as a trustee or fiduciary, because he has no interest in such moneys, and the right of the owner to recover them from the administrator is not a debt or claim against the estate. *Id.*
9. **FIDUCIARY, RECOVERY OF MONEYS FROM.** — Whenever a fiduciary relation exists, and money coming from the trust lies in the hands of a person standing in that relationship, it can be followed by the principal, and separated from any money of the wrong-doer. *Id.*
10. **FOLLOWING TRUST FUNDS IN HANDS OF ASSIGNEE.** — Where the treasurer of one corporation is induced by the president of another to discount a note executed by it to the first-named corporation, and to pay it the proceeds, which are used in its business, under the promise of such president, who is fully informed that such treasurer has no authority to make the transaction, that the money shall be repaid by a certain time, the money so advanced becomes a trust fund in the hands of the corporation to which it is loaned; and if it afterwards becomes insolvent, and assigns for the benefit of creditors, the creditor corporation may enforce the trust against the property in the hands of the assignee, to the exclusion of other creditors of the assignor. *Davenport Plow Co. v. Lamp*, 442.

See CORPORATIONS, 7-9; DEEDS, 3; MUNICIPAL CORPORATIONS, 16-20; PARTITION, 1; TRUST DEEDS.

UNAUTHORIZED APPEARANCE.

See JUDGMENTS AND DECREES, 10-13.

UNINCORPORATED COMPANIES.

See ASSOCIATIONS.

USAGE.

See MASTER AND SERVANT, 4; SALES, 3.

USURY.

1. **EVIDENCE OF NOTICE OF.** — Where, in an action to recover on a note secured by chattel mortgage, and alleged to have been purchased for value, and *bona fide*, before maturity, the defense is interposed that

the note was tainted with usury, of which the purchaser had notice at the time of purchase, proof of the fact alone that the purchaser knew that the payee of the note was loaning money at a usurious rate of interest would not of itself be sufficient to charge such purchaser with notice of the defense of usury, yet it would be competent as a circumstance to be considered, in connection with other proven or admitted facts, as tending in that direction, and for this reason is admissible. *Blackwell v. Wright*, 662.

2. **BURDEN OF PROOF.**—Where the note sued on by the holder, who claims to be a purchaser, before maturity, in good faith and for value, is shown to be tainted with usury, the burden of proving the good faith of the transaction, without notice of the usury, is upon such purchaser. *Id.*
3. **USURY AS DEFENSE.**—Where a party has delivered cotton to a warehouseman, taking his receipt therefor, and has subsequently assigned such receipt to a third person to secure the payment of a usurious note, the holder of the receipt may maintain trover against the warehouseman to recover the cotton, after demand and refusal to deliver it. The holder of the receipt and the warehouseman are not privies, and the latter cannot set up the defense of usury, in the absence of proof that he claims the cotton under the maker of the note, or has an interest in it derived through him. *Zellner v. Mobley*, 390.
4. **USURY AS DEFENSE CAN ONLY BE TAKEN** by a party to the usurious agreement, or persons representing him as privies in blood or estate. A stranger cannot set up usury as a defense to an action. *Id.*

"VACANT OR UNOCCUPIED."

See **INSURANCE**, 6, 12, 13.

VACATING JUDGMENTS.

See **JUDGMENTS AND DECREES**.

VARIANCE.

See **INSURANCE**, 21.

VENDOR AND VENDEE.

1. **WHERE WRITTEN PORTION OF CONTRACT FOR SALE OF LAND** is inconsistent with the printed form upon which the contract is drawn, as to the character of deed to be executed, the written portion must control. *Gilbert v. Stockman*, 23.
2. **JURISDICTION TO CANCEL CONTRACT OF SALE OF LAND IN FOREIGN COUNTRY FOR FRAUD.**—The courts of California have jurisdiction to set aside a contract between non-residents for the sale of mining property in Mexico, on the ground of fraud, and to cancel notes and mortgages given as part consideration, when it appears that such contract was made in California, the purchase-money paid and invested in that state, and the notes and mortgages given by a citizen of that state and made payable to a resident thereof; nor is it any objection to the relief sought, when all the parties are within the jurisdiction of the court, that the property is to be restored to the vendor in accordance with the laws of Mexico as a condition precedent to equitable relief. *Loaiza v. Superior Court*, 197.

3. **RESCISSION OF CONTRACT—JURISDICTION.**—In an action to compel the vendor to restore the consideration, resting in executory contracts, fraudulently received, and which is still within the state, under a contract between non-residents for the sale of property in a foreign country, but made within the state, the state courts have jurisdiction to rescind such contract and restore the consideration, although the vendor has not been personally served with process, and has not submitted himself to the jurisdiction of the court, except through service by publication. *Id.*
4. **VALID CONTRACT TO PURCHASE—RESCISSION.**—To a valid contract to purchase land, there must be parties capable of contracting, consent, a lawful object, and sufficient consideration. The consent must be free, mutual, and communicated by one to the other, and not induced by fraud, undue influence, or mistake, or it may be rescinded by either party without the consent of the other. *Id.*
5. **EXECUTORY CONTRACTS, GIVEN AS CONSIDERATION** for the purchase of land in a foreign country, may be rescinded for fraud, according to the laws of the state where they were made and were to be executed, and such consideration, when within the jurisdiction of the court, returned to the vendee, notwithstanding the non-residence of the parties to the contracts; nor is their mutual consent necessary to rescission. *Id.*
6. **RESCISSION OF CONTRACT FOR FRAUD—REMEDY OF VENDEE.**—Where a purchase has been induced by fraud, an offer by the purchaser to restore everything of value received under the contract of purchase, whether accepted or not, if followed with prompt and proper notice of rescission, completes the rescission, and the vendee may then seek the aid of a court to compel the return of the purchase-money still within its jurisdiction, notwithstanding the non-residence of the vendor, and that the land agreed to be purchased is situated in a foreign country. *Id.*
7. **RESCISSION OF CONTRACT—RECEIVER.**—A court having jurisdiction to rescind a contract of purchase for fraud, and to restore the purchase-money paid thereunder, which is still within its jurisdiction, has power to appoint a receiver of such money, to preserve it and retain it within the jurisdiction of the court, until the rights of the parties are adjudicated. *Id.*
8. **RESCISSION—SUFFICIENCY OF EVIDENCE.**—*Prima facie* evidence of an agreement to prevent competition at a sale, of which the vendor alleges he had no knowledge at the time of the sale, is not ground for the rescission of the sale, when an unexplained delay of one year and a half has elapsed from the time of sale to the time of bringing the action to rescind. *Hammond v. Wallace*, 239.
9. **RESCISSION—LACHES.**—An unexplained delay of one year and a half from the time of sale to the time of bringing an action to rescind on the ground of fraud is unreasonable, and fatal to the action. *Id.*
10. **RESCISSION—TENDER OF CONSIDERATION PAID BEFORE SUIT.**—An action to rescind a sale of land on the ground of fraud will not lie, unless the consideration paid is returned or tendered before suit, and an allegation that the vendor is able and willing to return it, and now offers to do so, is insufficient. *Id.*
11. **RESCISSION OF OPTION TO PURCHASE.**—The vendor of an option to purchase land is bound at all times within the period of the option to convey a good title to the land mentioned therein, upon payment of the purchase price; and if the purchaser, within the time named in the

option, ascertains that the vendor has no title and cannot make a perfect conveyance of the land named, he may at once rescind the option and recover what he has already paid thereunder, without first tendering payment and demanding a conveyance. *Burks v. Davies*, 213.

12. **RESCISSION OF OPTION TO PURCHASE FOR DEFECT IN TITLE.** — A purchaser under an option for the sale of real estate, which is given for a sum to be forfeited in case the purchase is not consummated by a certain day, may, upon ascertaining that the vendor is not the owner of the whole title, rescind the contract within the time mentioned in the option, and recover the amount paid, although the vendor, after notice of the rescission, offers to perfect the title, but fails to do so within the time mentioned in the option. *Id.*
13. **EVIDENCE OF FALSE REPRESENTATIONS OF VALUE BY VENDOR.** — In an action to recover the possession of personal property, exchanged for real estate in another state, with which the vendor was acquainted and of which the vendee knew nothing, the evidence of the vendee is admissible, that the vendor represented the land to be worth double its real value, and that, relying upon such representations, as well as others as to the quality of the land, he was induced to make the trade; and the vendee cannot be compelled, on cross-examination, to testify as to whether or not he was dealing in land in both states at the time, when it is conceded that he knew nothing of the land in dispute, or of the value of land in that neighborhood. *Cressler v. Rees*, 691.
14. **MISREPRESENTATIONS AS TO QUALITY AND TITLE AS GROUND FOR RESCISSION.** — Misrepresentation of material facts regarding the quality and title to land, made by the vendor, and relied upon by the vendee as true, is sufficient ground for rescission of the sale. *Id.*
15. **MISREPRESENTATIONS, WHEN QUESTION OF FACT.** — Where the evidence is conflicting as to whether or not the vendee in purchasing relied upon the truth of misrepresentations of material facts made by the vendor as to the value and quality of the land, the question is one of fact, to be determined by the jury. *Id.*
16. **EFFECT OF BOND FOR TITLE.** — The effect of giving a bond for title, upon the sale of land, is to vest in the vendee the equitable title; and the return of the bond to the vendor by a third person, without the knowledge or consent of the vendee, and the destruction of his note for the unpaid purchase-money, will not extinguish his equitable title. Hence a subsequent purchase of the land by such third person from the original vendor only subrogates the former to the latter's rights and he holds merely as mortgagee, and not as owner. *Robertson v. Read*, 183.

See AGENCY, 3; EVIDENCE, 5, 6; FRAUDULENT CONVEYANCES, 7, 8.

VERDICT.

See CRIMINAL LAW, 2, 7; DAMAGES, 5; TRIAL, 3, 4.

VICE-PRINCIPAL.

See MASTER AND SERVANT, 20, 21.

VOLUNTARY ASSOCIATIONS.

See ASSOCIATIONS.

VOLUNTEERS.

See MASTER AND SERVANT, 17-19.

WAGES.

See ATTACHMENT AND GARNISHMENT, 6, 7; MASTER AND SERVANT, 22.

WAIVER.

See AGENCY, 3; ATTACHMENT AND GARNISHMENT, 5; EXECUTIONS, 10, 11; INSURANCE, 22-24; JUDGMENTS AND DECREES, 15; JUSTICE OF THE PEACE, 1; REPLEVIN, 3; TRIAL, 7.

WAREHOUSEMEN.

EFFECT OF DELIVERY OF RECEIPT. — The delivery of a warehouse receipt has the same effect in transferring the title to the property as the delivery of the property itself, and the warehouseman thereby becomes the bailee to the transferee. *Zellner v. Mobley*, 390.

See USURY, 3.

WARRANTY.

See SALES, 4, 5.

WASTE.

See LANDLORD AND TENANT, 5.

WATERCOURSES.

1. **RIPARIAN OWNER OF LAND ADJACENT TO THE WATER MAY CONSTRUCT DOCKS, LANDINGS, PIERS, AND WHARVES** out to navigable waters, if the water is navigable in fact, and if not so navigable, he may construct anything he pleases to the thread of the stream, unless he injures some other riparian proprietor or those having a superior right to use the water for hydraulic purposes. *City of Janesville v. Carpenter*, 123.
2. **RIPARIAN OWNER'S RIGHT TO BUILD IN FRONT OF HIS LAND OUT TO NAVIGABLE WATER** cannot be taken away, or its value lessened or impaired, even for public use, without compensation, or without due process of law, and it cannot be taken at all for any private use. *Id.*
3. **RIPARIAN RIGHTS, NATURE AND EXTINGUISHMENT OF.** — Riparian rights are an appurtenance to the land, running with it as a corporeal hereditament. They may be segregated by grant or condemnation, or extinguished by prescription, but cannot be defeated by simple appropriation. *Alta etc. Co. v. Hancock*, 217.
4. **RIPARIAN RIGHTS — EXTINGUISHMENT.** — As to riparian rights, actual and uninterrupted user, if adverse, for a useful purpose, and under claim of right, continued for the statutory period, gives a prescriptive right, and extinguishes the rights of the riparian proprietor. *Id.*
5. **RIPARIAN RIGHTS — PRESCRIPTION.** — APPROPRIATION is not necessary to prescription in relation to acquiring riparian rights, but it affords one who seeks to acquire rights by prescription this advantage, that it gives to prior claimants notice that his user is adverse and under claim of right, and sets the statute in motion against such prior claimants. *Id.*
6. **RIPARIAN RIGHTS — IRRIGATION.** — The right of the riparian proprietor to the use of water for irrigation is among the last of his riparian rights, and cannot be extended even by implication. It must always be held in

subordination to the rights of all other riparian owners to the use of the water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract held as an entirety, bordering upon the stream, whatever its extent. After this, the right of the riparian owner to a reasonable use of the water for the purposes of irrigation is acknowledged in common with others in like situation. *Id.*

7. **RIPARIAN RIGHTS EXTEND TO ALL LAND** held as an entirety bordering upon a stream, whatever its extent, and the area of land to which riparian rights are appurtenant cannot be diminished by the acts of a trespasser segregating for the time being the actual occupancy, without segregation of the title of a portion of the land held as an entirety not bordering on the stream, nor can the use of all the waters of the stream for the irrigation of that portion of the tract change the law, and establish that only that portion is riparian to the stream. *Id.*
8. **RIPARIAN RIGHTS — PRESCRIPTION.** — **THE ADVERSE ENJOYMENT** necessary to a prescriptive right to divert and use the water of a stream must have been asserted under claim of title, with the knowledge and acquiescence of the party having the prior right, and must have been such an invasion of his right that he would have had ground of action against the intruder, and must be accompanied by all the elements necessary to make out an adverse possession, and be continuous and uninterrupted for five years. *Id.*
9. **RIPARIAN RIGHTS OF OWNER OF LAND IN WATER**, or the use thereof, flowing upon such land, is not lost by user upon such land by another, under no claim of right to divert it or use it elsewhere, no matter how adverse or long continued, and it makes no difference that during part of this time the land was held adversely to the owner, if such holding was interrupted before it ripened into a title by prescription. *Id.*
10. **RIPARIAN RIGHTS — INTERRUPTION OF PRESCRIPTIVE RIGHT TO WATER.** — An interruption by suit in ejectment, so as to prevent the acquiring of a prescriptive right to land, also interrupts the use of water appurtenant thereto being used thereon, so as to prevent the acquiring of a prescriptive right to the use of the water there or elsewhere, and a recovery of the land carries with it the recovery of the water. *Id.*
11. **RIPARIAN RIGHTS.** — **USE OF WATER UPON LAND** to which it is already appurtenant, by a trespasser thereon, will not give him such right in the water as that he may thereafter divert it from the land, or upon being lawfully ejected therefrom, convey to a stranger a legal title in the water or in the use thereof. *Id.*
12. **SPRINGS, LAND-OWNER'S RIGHTS IN.** — The owner of land upon which a spring is located which creates a stream of water accustomed to flow through the land of others has only the rights of a riparian owner, and cannot divert the water from its natural channel to supply the inhabitants of a city. *Lord v. Meadville Water Co.*, 864.
13. **RIPARIAN RIGHTS IN SPRINGS — TAKING WITHOUT COMPENSATION IS TRESPASS.** — A corporation invested with the right of eminent domain may take a spring or stream of water issuing therefrom to supply a municipality; but it can only do so by making compensation to those who are deprived of their accustomed use of the water. A taking without compensation is a trespass, and the corporation so taking may be proceeded against as a trespasser. *Id.*
14. **ISLANDS.** — **CONVEYANCE OF LAND ABUTTING ON A NAVIGABLE STREAM** vests title in the grantee to the thread of the stream, including any

islands which lie between the thread of the stream and the land so conveyed. *Chandos v. Mack*, 139.

15. UNSURVEYED ISLANDS LYING BETWEEN THE CENTER OF A STREAM AND LANDS GRANTED by the government without any reservation vest in the grantee of such grant. *Id.*

See HOMESTEAD; NUISANCES, 1, 2, 6; PUBLIC LANDS.

WATER FIXTURES.

See LANDLORD AND TENANT, 1.

WHARVES.

See WATERCOURSES.

WILLS.

1. CONVEYANCE OTHERWISE PERFECT IN FORM IS NOT CONVERTED INTO A WILL by inserting in it a clause declaring that it is to go into effect after the death of the grantor, and that he claims the right to hold the land so long as he lives. *Seals v. Pierce*, 344.
2. NUNCUPATIVE WILLS, ESSENTIALS TO VALIDITY OF. — Nuncupative wills demand strictness of proof in all essential points; and to be valid, must be executed by the testator while in *extremis*, as a matter of necessity, and not of choice. *Scatfe v. Emmons*, 383.
3. NUNCUPATIVE WILL, VALIDITY OF. — A nuncupative will executed by a testator in his last illness, and three days before his death, while he had time, opportunity, and ability to have executed a formal written will, and by which he gave nearly his entire property to his widow, to the exclusion of his children, is illegal and void. *Id.*
4. CONFLICT OF LAWS — LEX REI SITÆ GOVERNS WHEN. — When the donee of a power of appointment by will of real estate situated in Pennsylvania dies domiciled in another state, having made such appointment, the validity of the appointment is to be determined by the law of Pennsylvania, which is the *lex rei sitæ*. *Lawrence's Estate*, 924.
5. CONSTRUCTION. — Where a will contains an absolute devise to a devisee, with a provision that if the latter "should die without children, grandchildren, or wife living," then to others, these words, in the absence of a contrary intent appearing from the face of the will, refer to the death of the devisee during the lifetime of the testator, and if the devisee survives him, he takes an estate in fee. *King v. Frick*, 889.
6. CONSTRUCTION — FEE-SIMPLE OR LIFE ESTATE. — Where an estate or interest in lands is devised, or personalty is bequeathed, in clear and absolute language, without words of limitation, the devise or bequest cannot be defeated or limited by a subsequent doubtful provision in the will, inferentially raising a limitation upon the prior devise or bequest. *Bills v. Bills*, 418.
7. CONSTRUCTION — FEE-SIMPLE OR LIFE ESTATE. — Where there is an absolute or unlimited devise of real property, or bequest of personalty, a subsequent clause in the will expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit it to a life estate. The will thus drawn must be interpreted to invest in the devisee or legatee the fee-simple title to the land, and the absolute property in the personalty. *Id.*
8. RULE IN SHELLEY'S CASE, DEVISE NOT WITHIN, WHEN. — To bring a devise within the rule in Shelley's case, the limitation in remainder must be to

the heirs in fee or in tail, as a *nomen collectivum* for the whole line of inheritable blood. In the case, therefore, of a devise of income to a daughter of the testator for life, with a limitation over to her heirs, excluding her husband and mother, the rule does not apply. And the circumstance that both the husband and mother have died since the death of the testator can have no effect. The testator's intent must be ascertained from the words of the will, which are to be read in the light of the circumstances under which it was written. *Kuntzleman's Trust Estate*, 909.

9. **PERPETUITIES, RULE AGAINST, IN PENNSYLVANIA.** — The rule against perpetuities, that no interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest, is in force in Pennsylvania, unaffected by statute, except as it is modified by the acts of 1853 and 1855, which operate only in restraint of accumulations. *Lawrence's Estate*, 925.
10. **RULE AGAINST PERPETUITIES APPLIES TO POWER AS WELL AS TO APPOINTMENT.** — Where a power of appointment is given either by deed or by will, the rule against perpetuities applies as well to the power as to the appointment, and if the power can be exercised at a time beyond the limits of the rule, it is bad; but when it must be exercised, if at all, within the legal limit, it is not rendered bad by the fact that, within its terms, an appointment might possibly have been made which would be too remote. *Id.*
11. **REMOTENESS OF ESTATE CREATED BY APPOINTMENT MEASURED FROM CREATION OF POWER WHEN.** — A power of appointment to be exercised by will only must be regarded as special, and therefore the remoteness of the estate created by the appointment must be measured from the time of the creation of the power. *Id.*
12. **APPOINTMENT FOR LIFE OF APPOINTEE VALID, THOUGH REMAINDER TOO REMOTE.** — When the donee of a power to appoint by will appoints in trust for life tenants to take at his death, with remainder over, such appointment for life will be good, whether the appointees were born before or after the creation of the power, and that although the estate in remainder may be too remote. *Id.*
13. **RULE AGAINST REMOTENESS SATISFIED IN CASE OF APPOINTMENT OF ESTATE IN REMAINDER WHEN.** — If an estate in remainder appointed by a donee of a power of appointment by will is vested at his death, its enjoyment being merely postponed until the determination of a preceding vested estate for life, the rule against remoteness, which has regard to the time when the estate vests, is satisfied. *Id.*
14. **DONEE OF POWER OF APPOINTMENT MAY DECLARE TRUSTS FOR LIFE WITH REMAINDER OVER.** — Where an unrestricted power of appointment by will is given, the donee, observing the rule against remoteness, has power to appoint the fee to trustees for the benefit of certain persons for life, with remainder over in fee. *Id.*

See CORPORATIONS, 8, 9.

WITNESSES.

1. **WITNESS CANNOT BE IMPEACHED BY PARTY CALLING HIM,** but such party may prove the truth by other witnesses, even though they contradict the witness first called. *Blackwell v. Wright*, 662.
2. **WITNESS, CONTRADICTING, BY PRIOR STATEMENTS.** — If a witness has testified concerning the speed at which a train was running at the time of an

accident, and is asked if he did not have a conversation shortly after the accident, and whether he did not then make a statement regarding such rate of speed, to which he replied that he has no recollection as to making such statement, another witness, called to rebut this testimony by discrediting the first witness, may be asked whether he had a conversation in which the first witness made the statement of which he denied having any recollection. *Heddles v. Chicago etc. R'y Co.*, 106.

3. **OPINION AS EVIDENCE OF NEGLIGENCE.** — In an action to recover for personal injuries received from attempting to alight from a railroad train, the opinion of a witness, as to whether the accident happened by reason of defendant's negligence or of plaintiff's inattention, is incompetent and inadmissible. *Kelley v. Detroit etc. R. R. Co.*, 514.

See EVIDENCE; PROCESS, 4, 5; TRIAL, 2.

WORDS AND PHRASES.

See DEFINITIONS.



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